SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 602

CAVOUR HARTLEY, EXECUTOR OF THE ESTATE OF G. G. HARTLEY, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the May Term, 1934, of said Court, before the Honorable Kimbrough Stone and the Honorable Archibald K. Gardner, Circuit Judges, and the Honorable Matthew M. Joyce, District Judge.

Attest:

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Seal)

Be It Remembered that heretofore, to-wit: on the seventh day of February, A. D. 1934, a record on petition to review the decision of the United States Board of Tax Appeals in the case of Commissioner of Internal Revenue, Petitioner vs. Cavour Hartley, Executor of the Estate of G. G. Hartley, Respondent, and on the twelfth day of February, A. D. 1934, a record on petition to review the decision of the United States Board of Tax Appeals in the case of Cavour Hartley, Executor of the Estate of G. G. Hartley, Petitioner, vs. Commissioner of Internal Revenue, Respondent, were filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, which said records as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

a (Order Extending Time to File Record to December 1, 1933, in No. 9946.)

United States Board of Tax Appeals.

Cavour Hartley, Executor of the Estate of G. G. Hartley, Petitioner,
Docket No. 42343. vs.
Commissioner of Internal Revenue, Respondent.

On motion of counsel for the respondent, it is

Ordered: That the time for preparation of the evidence and transmission and delivery of the record sur petition for review of the above entitled proceeding by the United States Circuit Court of Appeals, Eighth Circuit, be and it is hereby extended to December 1, 1933.

(signed) LOGAN MORRIS,
Member.

Dated Washington, D. C., October 24, 1933.

Now, January 25, 1934, the foregoing order enlarging time certified from the record as a true copy.

(Seal) B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

(Endorsed): Filed in the United States Circuit Court of Appeals for the Eighth Circuit on February 7, 1934, E. E. Koch, Clerk.

(Order Extending Time to File Record to January 5, 1934, in No. 9946.)

On motion of counsel for the respondent, it is

Ordered: That the time for preparation of the evidence and transmission and delivery of the record sur petition for review of the above entitled proceeding by the United States

Circuit Court of Appeals, Eighth Circuit, be and is hereby extended to January 5, 1934.

(signed) EUGENE BLACK,
Member.

Dated Washington, D. C., November 29, 1933.

Now, January 25, 1934, the foregoing order enlarging time certified from the record as a true copy.

(Seal) B. D. GAMBLE,
Clerk, U S. Board of Tax Appeals.

(Endorsed): Filed in the United States Circuit Court of Appeals for the Eighth Circuit on February 7, 1934, E. E. Koch, Clerk.

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b (Order Extending Time to File Record to February 7, 1934, in No. 9946.)

On motion of counsel for the respondent, it is

Ordered: That the time for preparation of the evidence and transmission and delivery of the record sur petition for review of the above entitled proceeding by the United States Circuit Court of Appeals, Eighth Circuit, be and it is hereby extended to February 7, 1934.

(signed) EUGENE BLACK,
Member.

Dated Washington, D. C., Dec. 28, 1933.

Now, January 25, 1934, the foregoing order enlarging time certified from the record as a true copy.

(Seal) B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

(Endorsed): Filed in the United States Circuit Court of Appeals for the Eighth Circuit on February 7, 1934, E. E. Koch, Clerk.

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c (Order Extending Time to File Record to December 1, 1933, in No. 9943.)

United States Board of Tax Appeals.

Commissioner of Internal Revenue, Petitioner,
Docket No. 42343. vs.
Cavour Hartley, Executor of the Estate of G. G. Hartley, Respondent.

On motion of counsel for the petitioner, it is

Ordered: That the time for preparation of the evidence and transmission and delivery of the record sur petition for review of the above entitled proceeding by the United States Circuit Court of Appeals, Eighth Circuit, be and it is hereby extended to December 1, 1933.

(signed) LOGAN MORRIS,
Member.

Dated Washington, D. C., October 24, 1933.

Now, January 29, 1934, the foregoing order enlarging time certified from the record as a true copy.

(Seal)

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

(Endorsed): Filed in the United States Circuit Court of Appeals for the Eighth Circuit on February 7, 1934, E. E. Koch, Clerk.

(Order Extending Time to File Record to January 5, 1934, in No. 9943.)

On motion of counsel for the petitioner, it is

Ordered: That the time for preparation of the evidence and transmission and delivery of the record sur petition for review of the above entitled proceeding by the United States Circuit Court of Appeals, Eighth Circuit, be and it is hereby extended to January 5, 1934.

(signed) EUGENE BLACK,
Member.

Dated Washington, D. C., November 29, 1933.

Now, January 29, 1934, the foregoing order enlarging time certified from the record as a true copy.

(Seal)

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

(Endorsed): Filed in the United States Circuit Court of Appeals for the Eighth Circuit on February 7, 1934, E. E. Koch, Clerk.

(Order Extending Time to File Record to February 7, 1934, in No. 9943.)

On motion of counsel for the petitioner, it is

Ordered: That the time for preparation of the evidence and transmission and delivery of the record sur petition for review of the above entitled proceeding by the United States Circuit Court of Appeals, Eighth Circuit, be and it is hereby extended to February 7, 1934.

(signed) EUGENE BLACK,
Member.

Dated Washington, D. C., Dec. 28, 1933.

Now, January 29, 1934, the foregoing order enlarging time certified from the record as a true copy.

(Seal) B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

(Endorsed): Filed in the United States Circuit Court of Appeals for the Eighth Circuit on February 7, 1934, E. E. Koch, Clerk.

1

Docket Entries.

Cavour Hartley, Executor, Estate of G. G. Hartley, Petitioner,
Docket No. 42343 vs.
Commissioner of Internal Revenue, Respondent.

Appearances.

For Taxpayer: Frank W. Wilson, C. P. A., H. B. Fryberger, Esq.,

For Comm'r.: J. A. Lyons, Esq., C. A. Ray, Esq.

1929
Jan. 15—Petition received and filed. Taxpayer notified. (Fee paid)

" 16—Copy of petition served on General Counsel.

Mar. 14—Answer filed by General Counsel.

" 25—Copy of answer served on taxpayer—assigned General Calendar.

1930
Dec. 22—Motion to transfer to the St. Paul, Minn., Circuit Calendar filed by taxpayer. 12/23/30 granted.

1932

Jun. 13—Hearing set at St. Paul, Minn. beginning July 11, 1932.

Jul. 26—Hearing had before W. C. Lansdon at St. Paul, Minn. Submitted on merits. Briefs due Sept. 25, 1932. Called July 11, 1932.

Aug. 24—Transcript of hearing July 26, 1932 filed.

Sep. 23—Motion for extension to 10/15/32 to file brief filed by General Counsel. 9/24/32 granted.

" 24—Brief filed by taxpayer.

Oct. 15—Brief filed by General Counsel.

1933

Mar. 16—Findings of fact and opinion rendered, W. C. Lansdon, Div. 8. Decision will be entered under Rule 50.

May 5—Notice of settlement filed by General Counsel.

" 12—Hearing set May 31, 1933 on settlement under Rule 50.

" 31—Hearing had before Mr. Marquette, Div. 1 on settlement under Rule 50. Referred to Mr. Lansdon for decision.

Jun. 3—Decision entered, W. C. Lansdon, Div. 8.

Aug. 25—Petition for review by U. S. Circuit Court of Appeals (8) with assignments of error filed by taxpayer.

" 29—Petition for review by U. S. Circuit Court of Appeals (8) with assignments of error filed by General Counsel.

Sep. 1—Proof of service filed by taxpayer.

" 7—Proof of service filed by General Counsel.

Oct. 24—Motion for extension to Dec. 1, 1933 to complete and transmit record in both appeals filed by General Counsel.

" 24—Order enlarging time to Dec. 1, 1933 for preparation of evidence and delivery of record entered. (Taxpayer)

" 24—Order enlarging time to Dec. 1, 1933 for preparation of evidence and delivery of record entered. (General Counsel.)

Nov. 29—Order that time for preparation of evidence and delivery of record sur petition for review be extended to Jan. 5, 1934, entered. (Taxpayer.)

2

" 29—Motion for extension to Jan. 5, 1934 to complete and transmit record in both appeals filed by General Counsel.

" 29—Order that time for preparation of evidence and delivery of record sur petition for review be extended to Jan. 5, 1934 entered. (Commissioner.)

Dec. 28—Motion for extension to Feb. 7, 1934 to complete and transmit record filed by General Counsel.

Dec. 28—Order enlarging time to Feb. 7, 1934 for preparation of evidence and delivery of record entered. (General Counsel.)

Dec. 28—Order enlarging time to Feb. 7, 1934 for preparation of evidence and delivery of record entered (taxpayer).

1934

Jan. 12—Praecipe with proof of service thereon filed by taxpayer.

Jan. 12—Agreed statement of evidence lodged by taxpayer.

Jan. 15—Agreed statement of evidence approved and ordered filed.

Jan. 20—Praecipe with proof of service thereon filed by General Counsel.

Jan. 20—Agreed statement of evidence lodged by General Counsel.

Jan. 22—Agreed statement of evidence approved and ordered filed.

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3 (Petition of Cavour Hartley, Executor, etc., for Appeal.)

Filed January 15, 1929, United States Board of Tax Appeals.

United States Board of Tax Appeals.

Cavour Hartley, Executor, Estate of G. G. Hartley, Duluth, Minn., Petitioner,

Docket No. 42343 vs.

Commissioner of Internal Revenue, Respondent.

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his deficiency notice IT:AR:B-3-ML-60D dated November 22, 1928, and as a basis of this proceeding alleges as follows:

1. Petitioner is an individual as managing executor of the Estate of G. G. Hartley, deceased, with his principal office at 740 East Superior Street, Duluth, Minnesota.

2. Notice of deficiency (copy of which is attached and marked "Exhibit A") was mailed to the petitioner on November 22, 1928.

3. The taxes in controversy are income taxes for the calendar years 1924 and 1925 and for $3,261.02 for the year 1924 and $12,640.00 for the year 1925.

4. The determination of tax set forth in said notice of deficiency was based upon the following errors:

(a) Erroneous use by respondent of the appraised value at date of death of real estate as a basis for the computation of gain or loss upon the sale thereof and a like use of such appraised value as a basis for the computation of depreciation and depletion, petitioner having previously filed with respondent his written election, as provided in Section 702 in the Revenue Act of 1928, not to come within the provisions of section (a) of that Section.

(b) Erroneous computation of depletion deductions allowable for the years 1924 and 1925, in the following particulars:

1. Respondent failed to recognize the method of computing depletion which has been established in the United States District Court and the United States Circuit [—] of Appeals in Chicago, Illinois in the cases of Hull vs. McHale and McHale vs. Hull and of Spaulding vs. Reinecke and Reinecke vs. Spaulding.

2. Respondent has failed to allow petitioner depletion computed on the same basis as would have been allowed decedent had he not died, as provided for in Treasury Decision No. 4011.

3. Respondent has refused to allow any depletion to petitioner on certain mines, claiming that the tonnage of ore known to have been in such mines at the basic date was exhausted during the years here involved, notwithstanding that it is an accomplished fact that such ore was not exhaust[illegible].

(c) Disallowance by respondent as a deduction from income of petitioner of annuities paid in the year 1924 of $186.15 and in the year 1925 of $17,500.00, such annuities having been paid out of income pursuant to the provisions of the will of decedent and/or order of court.

(d) Disallowance by respondent as a deduction from gross income of petitioner of salaries, attorneys and accountants fees and expenses paid in the year 1924 in the amount of $14,909.58, and of salaries, expenses and accountants fees paid in the year 1925 in the amount of $8,882.11, such expenses having been paid by petitioner in the regular conduct of its business and in the production of income which respondent has computed as having been earned by petitioner.

(e) Disallowance by respondent as a deduction from gross income of petitioner of a net loss sustained by petitioner in the year 1923, such net loss amounting for the year 1924 to $75,100.60 and for the year 1925 to $52,820.57.

5. The facts upon which the petitioner relies as a basis of this proceeding are as follows:

The Estate of G. G. Hartley was created on January 17, 1922 upon the death of G. G. Hartley of Duluth, Minnesota. The assets of the estate consisted of large holdings of real estate, both improved and unimproved, included in which was the fee to a number of iron ore mines which were, at the date of the creation of the Estate, under leases on royalty bases. The administration of the estate has been extremely difficult and prolonged and, in fact, at the date of the filing of this petition is still in process. The administration of the estate has been unnecessarily prolonged through a series of more or less unfounded claims for income taxes which respondent has made against decedent and for estate taxes against the estate. During this period of administration it has been necessary for petitioner to operate the business of the estate, and the disputes involved in this petition are the result of such operation of the estate. The question of depletion raised herein leaves it for the Board to decide whether or not depletion should be allowed petitioner upon the basis which has been established in the courts as set forth in 4 (b) (1) above, or upon the basis of Treasury Decision 4011, and whether respondent is justified in refusing to allow any depletion for the extraction or payment of ore from some of the iron mines involved. Annuities paid under the provisions of the will of the decedent from income are deductible under law, whereas respondent has refused the allowance of such deductions in this case. Expenses paid

or incurred by petitioner in the conduct of the business of the estate are clearly allowable as deductions from gross income, although such expenses have been disallowed by respondent to the extent set forth above. Also, net losses sustained in the operation of a business in any year may legally be carried forward for the two succeeding years as deductions from gross income, whereas respondent has refused to allow such a net loss sustained in the year 1923 to be carried forward to either the year 1924 or the year 1925.

Wherefore, petitioner prays that this Board may hear this proceeding and determine upon what basis depletion should be computed, and allow as deductions from gross income annuities, expenses and net losses as set forth above.

FRANK W. WILSON,
Counsel for Petitioner,
514-517 Providence Building,
Duluth, Minnesota.

State of Minnesota,
County of St. Louis—ss.

Cavour Hartley, being duly sworn, says that he is the petitioner above named; that he has read the foregoing petition and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief and those facts he believes to be true.

CAVOUR HARTLEY.

Subscribed and sworn to before me this 11th day of January, 1929.

(Notarial Seal)

A. J. NOLAN,
Notary Public, St. Louis Co., Minn.

My Commission Expires Jan. 30, 1935.

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6 Exhibit "A".

November 22, 1928.

IT:AR:B-3
ML-60D.

Mr. Cavour Hartley, Executor,
Estate of G. G. Hartley,
740 East Superior St.,
Duluth, Minnesota.

Dear Sir:—

In accordance with Section 274 of the Revenue Act of 1926 you are advised that the determination of the tax

liability of the above-named estate for the years 1924, 1925 and 1926 discloses a deficiency of $15,901.02, as shown in the attached statement.

The section of the law above mentioned allows you to petition the United States Board of Tax Appeals within sixty days from the date of the mailing of this letter for a redetermination of your tax liability. However, if you acquiesce in this determination, you are requested to executed the enclosed Form 866 and forward both original and duplicate to the Commissioner of Internal Revenue, Washington, D. C., for the attention IT:C:P-7.

Respectfully,

D. H. BLAIR, Commissioner,
By ....
Acting Deputy Commissioner.

Enclosures:
Statement
Form 866
Form 882

Form 7928
SAB-1

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7 Statement.

November 22, 1928.

IT:AR:B-3
ML-60D

In re: Mr. Cavour Hartley, Executor,
Estate of G. G. Hartley,
740 East Superior Street,
Duluth, Minnesota.

Years	Deficiency in Tax
1924	$ 3,261.02
1925	12,640.00
1926	None
Total	$15,901.02

The report of the Internal Revenue Agent in Charge at St. Paul, Minnesota, covering an investigation of the books and records of the Estate of G. G. Hartley for the years 1924 and 1926, inclusive, has been reviewed in connection with information submitted in briefs dated July 27, 1928, and October 20, 1928, and at a conference held on October 16, 1928.

You are advised that the contentions of your representative have been denied.

The retroactive provisions of Section 702 of the Revenue Act of 1928 and the provisions of Treasury Decision 4177 (published in Internal Revenue Bulletin VII-29), are relied upon in support of the Bureau's use of the appraised value of real estate at the time of the death of the decedent as the basis for computing profit on the sale of real estate and in computing depreciation and depletion. It is noted that this basis was used in the returns as filed.

The adjustment of the returns is as follows:

1924		
Net loss reported on return		$52,820.57
Add:		
1. Other income	$ 1,092.84	
2. Losses reduced	100.00	
3. Contributions disallowed	3,000.00	
4. Other deductions disallowed	90,196.33	94,389.17
Total		$41,568.60
Deduct:		
5. Depletion		6,386.11
Net income as adjusted		$35,182.49

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Computation of Tax	
Net income adjusted	$35,182.49
Less:	
Personal exemption	1,000.00
Income subject to normal tax	$34,182.49
Normal tax at 2% on $ 4,000.00	$ 80.00
Normal tax at 4% on $ 4,000.00	160.00
Normal tax at 6% on $26,182.49	1,570.95
Surtax on $35,182.49	1,450.07
Total tax assessable	$ 3,261.02
Tax previously assessed	None
Deficiency in Tax	$ 3,261.02

Explanations

1. The amount of $1,092.84 has been included as income, representing the profit of the decedent for acting as agent in the sale of "Wisdom Lots."

2. The loss of $1,507.58 claimed with reference to condemned property has been reduced to $1,407.58, computed as follows:

Cost	$1,000.00
Cost of wrecking	1,258.08
Total cost	$2,258.08

Less:	
Depreciation	100.00
Depreciated cost	$2,158.08
Salvage	750.00
Loss	$1,407.58

3. The payment of $3,000.00 to St. Luke's Hospital on account of a subscription made by the decedent is held not to be deductible as a contribution since the will did not direct that this amount be paid out of income. A similar case was considered in Committee on Appeals and Review Recommendation 280, published in Internal Revenue Cumulative Bulletin III, Page 203.

4. The difference of $90,196.33 in "Other deductions" was computed as follows:

	Claimed on Return	Allowed	Difference
(a) Salaries	$ 23,535.13	$16,342.56	$ 7,192.57
(b) Annuities	4,000.80	3,814.65	186.15
(c) Expenses	2,633.60	1,316.80	1,316.80
(d) Attorney fees	5,000.00		5,000.00
(e) 1923 net loss	75,100.60		75,100.60
(f) Accountant's fee	2,000.21	600.00	1,400.21
	$112,270.34	$22,074.01	$90,196.33

(a) The deduction for office salaries has been reduced by $7,192.57, since it appeared that approximately 50 per cent of the total deduction was applicable to property distributed to heirs during 1924. No evidence has been furnished to indicate that such apportionment was incorrect.

(b) The deduction for annuities has been reduced from $4,000 to $3,814.65. Since annuities in the amount of $17,600.00 were to be paid out of interest received from Liberty Bonds and Northern Pacific Bonds set up for that purpose, only the excess not covered by these interest allowances will be deductible as follows:

Total interest received (Northern Pacific Bonds)	$ 2,250.00
Total interest received (Liberty Bonds)	14,535.35
Total	$16,785.35
Annuities paid	17,600.00
Excess deductible as being paid out of ordinary income	$ 814.65
Additional allowance made by court for maintenance of home	3,000.00
Total paid to Mrs. Hartley out of ordinary income and therefore deductible	$ 3,814.65

(c) The deduction for expenses has been reduced from $2,633.60 to $1,316.80 since it is considered that 50% of the expenses was incurred in connection with property which was distributed to the heirs. No evidence has been submitted to show such apportionment was incorrect.

(d) Attorney fees in the amount of $5,000.00 were disallowed as an expense of the administration of the estate. Article 292 of Regulations 65 relative to the Revenue Act of 1924 states that expenses of the administration of an estate such as court costs, attorney's fees and executor's commissions are chargeable against the corpus of the estate, and are not allowable deductions.

10 (e) The 1923 net loss is not deductible from income of subsequent years as this loss was not a statutory net loss as contemplated in Section 206 of the Revenue Act of 1924. This loss was sustained through the payment of Federal Estate taxes in 1923. It is held that the payment of an estate tax imposed upon the transfer of the estate of a decedent does not give rise to a loss resulting from the operation of the business of an estate. In support of its contention the Bureau refers to Income Tax Ruling 1803 published in Internal Revenue Cumulative Bulletin II-2, Page 36 and to the decision of the United States Board of Tax Appeals in the case of H. J. Schlesinger, published in United States Board of Tax Appeals reports, Volume 5, Page 943.

(f) Accountant's fees have been apportioned between administration and current work as follows:

Allowed for current estate work	$ 600.00
Disallowed as being administrative work in connection with income tax of decedent and Federal Estate Tax	1,400.21
	$2,000.21

The portion representing administrative work has been disallowed for the reasons set forth in paragraph (d) above.

5. The depletion deduction of $41,663.62 claimed on the return has been increased to $48,049.73, computed as follows:

Mine	Tons Paid for	Royalties Received	Depletion Rate	Depletion Sustained and allowed
McEwen	40,000	$ 6,000.00	.08529	$ 3,411.60
Brown #1	256,487	12,824.36	.01665	4,270.51
Brown #2	134,523	6,726.11	.02943	3,959.01
Judd	174,291	19,244.77	.08345	12,525.78**
Hemmens	80,000	10,000.00	.08318	2,233.25**

Snyder	710,592	62,176.77	.02479	17,615.58
Fletcher	30,000	1,312.52	.0304	912.00
Billings	100,000	9,375.00	.03122	3,122.00
Total		$127,659.53		$48,049.73

** Remainder of January 1922 value.

11

1925

Net Income

Net loss reported on return		$ 4,340.71
Add:		
1. Depletion reduced	$23,453.16	
2. Other deductions disallowed	79,202.68	102,655.84
Total		$98,315.13
Deduct:		
3. Interest reduced	$ 2,643.90	
4. Liberty Bond interest eliminated	14,399.00	17,042.90
Net Income as adjusted		$81,272.23

Computation of Tax

Net Income adjusted	$81,272.23
Less:	
Personal exemption	1,500.00
Income subject to normal tax	$79,772.23
Normal tax at 2% on $ 4,000.00	$ 80.00
Normal tax at 4% on 4,000.00	160.00
Normal tax at 6% on $71,772.23	4,306.33
Surtax on $81,272.23	8,101.72
Total Tax	$12,648.05
Less:	
Tax paid at source	8.05
Tax assessable	$12,640.00
Tax Previously assessed	None
Deficiency in tax	$12,640.00

Explanation of Changes

1. The deduction for depletion has been reduced from $67,272.81 to $43,819.65. The allowable depletion has been computed as follows:

12

Mine	Tons Paid for	Royalties Received	Depletion Rate	Depletion Sustained and Allowed
McEwen	40,000	$ 6,000.00	.08529	$ 3,411.60
Brown #1	389,643	19,482.13	.01665	6,487.56

Brown #2	130,247	6,512.33	.02943	348.59**
Judd	100,180	11,061.50	.08345	None
Hemmens	55,089	6,886.11	.08318	None*
Snyder	1,191,525	104,258.42	.02479	29,537.90
Fletcher	30,000	1,312.52	.0304	912.00
Billings	100,000	9,375.00	.03122	3,122.00
Total		$164,888.01		$43,819.65

**Remainder of January 1922 value.
*January 1922 value exhausted in 1924.

2. The item of "Other deductions" shown on the return has been reduced from $96,171.64 to $16,968.96. The difference of $79,202.68 was computed as follows:

	Claimed on Return	Allowed	Difference
(a) Salaries	$21,533.34	$15,341.67	$ 6,191.67
(b) Annuities	17,500.00	None	17,500.00
(c) Expenses	2,054.59	1,027.29	1,027.30
(d) 1923 net loss	52,820.57	None	52,820.57
(e) Accountant's fees	2,263.14	600.00	1,663.14
	$96,171.64	$16,968.96	$79,202.68

The deductions in question were disallowed for the reasons set forth in connection with the disallowance of similar deductions for the year 1925.

3. Interest income has been decreased from $5,056.69 to $2,412.79. The difference of $2,643.90 consists of interest which was used in paying annuities as provided in the decree of partial distribution made by the Probate Court as of January 1, 1924.

4. The Liberty Bond interest of $14,399.00 has been eliminated from the return as it represents payment of an annuity as explained in Item (3) above.

	1926		
Net loss reported on return			$30,269.92
Add:			
1. Depletion	$21,670.96		
2. Other Income	13.12		
3. Other deductions reduced	19,118.75		40,802.83
Total			$10,532.91
13 Total tax forwarded			$10,532.91
Deduct:			
4. Interest		$ 2,031.60	
5. Liberty Bond interest		15,468.40	17,500.00
Net loss adjusted			$ 6,967.09

Explanation of Changes

1. The depletion deduction has been reduced from $29,135.66 to $7,464.70, computed as follows:

Mine	Royalties Received	Tons Paid For	Depletion Rate	Depletion Deduction Allowed
McEwen	$ 6,000.00	40,000	.08529	$ 3,411.60
Brown #1	2,129.78	42,595	.01665	709.21
Brown #2	3,635.97	72,719	.02943	None **
Judd	2,315.09	20,966	.08345	None **
Hemmens	3,750.00	30,000	.08318	None **
Snyder	42,219.66	482,510	.02478	480.64*
Fletcher	1,312.52	30,000	.0304	910.00
Billings	4,687.50	62,500	.03122	1,951.25
Total	$66,050.52			$ 7,464.70

** January 1922 value exhausted.
* Remainder of January 1922 values.

2. The difference of $13.12 represents additional profit on the sale of "Wisdom Lots."

3. The item of "Other deductions" has been reduced from $37,473.12 to $18,354.37, computed as follows:

	Claimed on Return	Allowed	Difference
Expense	$19,973.12	$18,354.37	$ 1,618.75
Annuities	17,500.00	None	17,500.00
Total	$37,473.12	$18,354.37	$19,118.75

14 4 and 5. The incomes reported from interest and Liberty Bond interest have been reduced by $2,031.60 and $15,468.40, respectively, representing amounts paid as annuities as provided for in a decree of the Probate Court.

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

You are advised that a copy of this communication has been transmitted to your attorney, Mr. Frank W. Wilson, 514 Providence Building, Duluth, Minnesota, who has on file in this office a duly recorded power of attorney.

15 (Answer of Commissioner of Internal Revenue.)

Filed March 14, 1929, United States Board of Tax Appeals.

United States Board of Tax Appeals.

Cavour Hartley, Executor, Estate of G. G. Hartley, Petitioner,

Docket No. 42343. vs.

Commissioner of Internal Revenue, Respondent.

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, in answer to the petition of the above-named taxpayer, admits and denies as follows:

1. Admits the allegations contained in the paragraph of the petition numbered 1.

2. Admits the allegations contained in the paragraph of the petition numbered 2.

3. Admits so much of the paragraph of the petition numbered 3 as alleges that the taxes in controversy are income taxes for the calendar years 1924 and 1925, and denies all other allegations contained in said paragraph of the petition numbered 3.

4. Denies that the respondent, in determining the deficiency taxes, committed errors as alleged in the paragraph of the petition numbered 4.

16 5. Admits so much of the paragraph of the petition numbered 5 as alleges that G. G. Hartley died January 17, 1922; that included in the assets of the estate of said G. G. Hartley was the fee to a number of iron ore mines which were, at the date of his death, under leases on a royalty basis; and denies all other allegations contained in said paragraph of the petition numbered 5.

6. Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore it is respectfully prayed that the determination of the Commissioner be approved,

(Signed) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
Frank T. Horner,
Special Attorney,
Bureau of Internal Revenue.

FTH/y
3/12/29

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17 (Findings of Fact and Opinion of United States Board of Tax Appeals.)

United States Board of Tax Appeals.

Cavour Hartley, Executor, Estate of G. G. Hartley,
Petitioner,
vs.
Commissioner of Internal Revenue, Respondent.

Docket No. 42343. Promulgated March 16, 1933.

1. The petitioner was eligible to file his election not to come within the provisions of section 702 (a) of the Revenue Act of 1928 in the computation of gain or loss from the sale of property in his hands as executor of an estate, but if exercised, such election results only in the recomputation of gain or loss from the sale of assets in the hands of an estate under provisions of law effective at date of filing the return.

2. Reasonableness of salaries and expenses determined.

3. Payment of Federal estate taxes in 1923 may not be used in the determination of a statutory net loss applicabe to tax liability in the two years immediately subsequent.

Frank W. Wilson, Esq., and H. B. Fryberger, Esq., for the petitioner.

J. A. Lyons, Esq., and B. M. Coon, Esq., for the respondent.

The respondent has asserted deficiencies in income tax for the years 1924 and 1925 in the respective amounts of $3,261.02 and $12,640. A number of assignments of error originally urged by the petitioning executor in his petition have been abandoned and the cause, by agreement, submitted for

decision upon the question of whether or not the respondent, in his computation, committed error (1) in using the value of the estate properties at the date of the death of decedent as his basis for computing gain or loss from the sale of assets and allowance for the depletion and depreciation; (2) in reducing in amount or rejecting in full certain salary and expense items claimed as deductions from gross income of the estate, and (3) in denying deductions claimed on account of an alleged net loss carried over from 1923.

Findings of Fact.

The petitioner is executor of the estate of G. G. Hartley, who died January 11, 1922, leaving sundry real, per-
18 sonal and mixed properties valued at approximately $3,000,000, producing an annual gross income of something like $200,000. Included therein were some fifteen iron mines operated under royalty leases and several thousand pieces of real estate consisting of farms and improved rental city properties. The personal property comprised a miscellaneous quantity of investment and income securities. In the conduct of his business the decedent maintained a considerable office organization which was supervised by a general office manager who employed assistants, bookkeepers, stenographers, and an engineer who had supervision over collection of royalties on the iron mines.

A number of years before his death the decedent set aside a group of choice income properties consisting of four buildings as a special family gift. These were carried in an account designated "Hartley Family" and the business manager paid the income therefrom to the members of the Hartley family. Such income consisted wholly of rentals which tenants brought in and paid to the office manager who devoted not more than three days in each month to work in connection therewith. For this service he was paid $1,000 annually out of the "Hartley Family" income.

None of the assets of the estate were distributed until February 24, 1925, when there was a partial distribution under order of the probate court. The partial distribution included property worth approximately $2,000,000.

After assuming control of the estate, the executors maintained intact the organization built up by the decedent and continued to carry on the business in the same manner in which it had been theretofore conducted. After the distribution set out above such office organization managed and con-

ducted the distributed properties as if they were still included in the estate.

In petitioner's income tax return for the years in review the executors claimed certain deductions from gross income which the respondent disallowed in part or in toto. These claims and sums disallowed for the years are as follows:

	1924		1925	
	Amount paid	Amount disallowed	Amount paid	Amount disallowed
Salaries	$23,535.13	$7,192.57	$21,533.34	$6,191.67
Annuities	4,000.80	186.15	17,500.00	17,500.00
Expenses	2,633.60	1,316.80	2,054.59	1,027.30
Attorney's fees	5,000.00	5,000.00	.....	.....
Accountant's fees	2,000.00	1,400.21	2,263.14	1,663.14

In his income tax returns for 1924 and 1925, the petitioner deducted the respective amounts of $75,100.60 and
19 $52,820.57 as alleged net losses brought forward from 1923 which the respondent has disallowed.

The petitioner seasonably filed his income tax returns for the years 1924 and 1925. He reported for the first year a loss of $1,184.39, and the second year a gain of $255.05 resulting from the sale of capital assets. For the year 1924 he claimed a deduction on account of depletion of iron mines in the amount of $41,663.62 and for the year 1925 in the amount of $67,272.81. In the same returns he also claimed deductions on account of depreciation of rental property in amounts that are not in controversy. In such returns the basis used for computing gain or loss on sales of property and depletion and depreciation of iron mines and rental property was the appraised value of the various properties at the date of decedent's death in conformity with article 343 of Regulations 69, which was in effect at the date of the respective filings. Upon audit the respondent made numerous adjustments of profits from sales and of depletion and depreciation and determined the deficiencies in controversy. On July 27, 1928, petitioner filed with the Commissioner a written election not to have the income tax returns of the estate governed by the provisions of subsection 702 (a) of the Revenue Act of 1928.

Opinion.

Lansdon: The income of the petitioner for each of the years 1924 and 1925 included gains from the sale of cap-

ital assets, royalties from the production of iron mines held under lease and income from rental properties. In order to determine the correct tax liability for such years, it is necessary to establish the basis upon which gain from the sales must be computed. Under the applicable statute and regulations effective in those years, such basis must also be used in computing deductions from income on account of depreciation and depletion. In his income tax returns for the years under review, the petitioner computed profits from sales of property and deductions claimed on account of depreciation and depletion on the basis of the values of the several properties at date of decedent's death, but he now contends that the correct basis is that to which the decedent was entitled in his lifetime. In the determination of the deficiencies here involved the respondent accepts the bases used by the petitioner in his original returns. There is no controversy over the facts involved in this issue. The parties have agreed that if the respondent's determinations as to profits, depreciation and depletion are affirmed, no recomputation will be required, and that if the petitioner prevails, the figures necessary to recomputation are not in dispute and are included in the record. We are asked to decide only the question of law upon which the parties differ.

The basis for determining gain or loss from the sale of assets by the executor of an estate was in controversy for many years after the enactment of the first income tax law. In article 343, practically identical in Regulations 45, 62, 65 and 69, interpreting the Revenue Acts of 1918, 1921, 1924 and 1926, the Commissioner included the following:

> Where, however, the executor sells property of the estate for more than its value at the death of the decedent, the excess is income taxable to the estate.

Notwithstanding the rule established by the regulations, many executors filed estate income tax returns in which gain or loss was computed on the basis to which the decedent was entitled in his lifetime. Early in the history of the Board proceedings involving this question were instituted and our decisions have quite consistently followed the regulations above cited. Dorothy Payne Whitney Straight, Executrix, 7 B. T. A. 177; Charles G. Barnes et al., Executors, 8 B. T. A. 360; William P. Blodgett, et al., 13 B. T. A. 1243; Russel Wolfe, Executor, 15 B. T. A. 835; Central Trust Co., Executor, 19 B. T. A. 867; Richard de Z. Pierce et al., Executors, 22 B. T. A. 1070; and James C. Ayer et al., 26 B. T. A. 9. The courts very generally have adopted the rule included in the

regulations above cited and the Board's interpretation thereof. Bankers Trust Co. vs. Bowers, 23 Fed. (2d) 901; Eldridge vs. United States, 31 Fed. (2d) 924. Hereinafter this rule will sometimes be referred to as the old basis.

On May 3, 1926, the Court of Claims, in McKinney vs. United States, 62 Ct. Cls. 180, adopted the view that the basis for determining gain from the sale of capital assets by an estate should be that to which the decedent was entitled in his lifetime. This rule will sometimes be referred to hereinafter as the new basis. Thereafter, on April 6, 1927, the Commissioner abrogated his regulation relating thereto which had been consistently followed for many years and promulgated T. D. 4011, VI-1 C. B. 77, giving effect to such decision. This new regulation remained in effect until July 7, 1928, when the Commissioner, interpreting Nichols vs. United States, 64 Ct. Cls. 246, promulgated April 4, 1927, as a reversal of the decision in McKinney, supra, and for the purpose of giving effect to Dorothy Payne Whitney Straight, Executrix, supra, and Banker's Trust Co., supra, promulgated T. D. 4177, VII-2 C. B. 134, restoring the regulations to their original form. In Elmhurst vs. United States, 69 Ct. Cls. 295, the court reaffirmed its decision in McKinney, supra, and undertook to distinguish Nichols, supra.

In view of the conflict between the decisions of the Court of Claims, the Board and some Federal courts, and in
21 the light of varying positions of the Commissioner, it is obvious that prior to the enactment of the Revenue Act of 1928 the matter of determining the basis for computing gain from the sale of capital assets by an estate was very much in need of clarification. Many controversies involving the question were pending in the Bureau of Internal Revenue, in the courts and before this Board. Included therein were cases in which returns had been filed prior to April 6, 1927, in accordance with Regulations 45, 62, 65 and 69, and others which had been filed while T. D. 4011 was effective. It was this chaotic condition which the Congress undertook to correct and relieve in the Revenue Act of 1928.

In his report on the provisions of the Revenue Act of 1928, Chairman Green of the Ways and Means Committee said:

In view of the decision of the Court of Claims in the McKinney vs. United States, it is desirable specifically to provide what basis shall be used in determining gain or loss on the sale of property by an estate. It is believed that the basis should be the value of the property on the date of the decedent's death. • • •

Under existing law, the basis in such case is the value at the date of "acquisition" which is indefinite and has given rise to controversies. The value on date of death affords an equitable and more determinable base.

In conformity with the above statement Congress enacted section 113 (5) of the Revenue Act of 1928, which, so far as pertinent herein, is as follows:

Property Transmitted at Death.—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be [for determining gain or loss] the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. * * *

The Revenue Act of 1928 was approved on May 29 of that year. On July 7, 1928, the Commissioner promulgated T. D. 4177 as set out hereinbefore and thereafter included the basis then accepted by Congress in article 596 of Regulations 74. The old basis was thus finally established in conformity with the decisions of this Board, of several courts and by Act of Congress as the legal and only rule for determining gain or loss from the sale of property in the hands of an estate in course of administration, but since section 113 (5) of the Revenue Act of 1928 is not retroactive, such basis at May 29, 1928, was settled law only as to the returns filed subsequent thereto. This enactment therefore in no way determined what the law was before the approval of the Revenue Act of 1928. One group of estates had filed returns prior thereto on the old, and another on the new, basis. A decision of the Supreme Court might establish either
22 the one or the other as the law at the several dates of the filing of such returns. No matter which basis was recognized by the court of the last resort, the estates filing to their disadvantage on that which was rejected would be entitled to relief if their returns had not been closed by agreement or by the statute of limitations, or their rights abridged by other conditions imposed by proper authority. Congress dealt with this situation by including section 702 (a) in the Act of 1928, which is as follows:

If in the return of any decedent's estate for any taxable year preceding the taxable year 1928, the basis, upon which gain or loss realized upon the sale or other disposition of

property acquired by the estate from the decedent was computed, was the value of the property at the time of the death of the decedent or was in accordance with the regulations in force at the time such return was filed, then the computation of such gain or loss shall be made upon such basis, unless claim for refund or credit in respect of such basis, or a written election not to come within the provisions of this subsection has been filed by the estate before the expiration of the period of limitation for filing claims.

In this proceeding the parties are in radical disagreement as to the effect of the election provided for in the law. The petitioner contends that having filed his return under the old, his election now entitles him to a recomputation of his tax liability under the new basis. The respondent has ruled in 9 C. M. 5215, VII-2 C. B. 97, and his counsel argues that Congress intended that only those estates which filed returns on the new basis should have the right of election. In our opinion the purposes of section 702 (a) are twofold. It is a statute of repose for all estates that were satisfied to settle their tax liabilities on the basis in effect when their returns were filed, and it is a relief provision for any estate that to its disadvantage had filed a return in conformity with regulations at date of filing, if such regulations were later held not to be in accordance with the law then effective. Congress could and did settle the basis to be used for all returns filed subsequent to the effective date of the Revenue Act of 1928, but it did not then know what would be the final judicial determination of the law prior to that date. Accordingly, section 702 (a) was framed to take care of estates coming under whichever basis was finally rejected as the law before the passage of the Act of 1928. It is now well settled that the old basis was the law at the date the petitioner filed his return. Brewster vs. Gage, 280 U. S. 327. The right of election therefore gives him nothing which he did not have before. If he had an appeal pending before the Bureau of Internal Revenue, the Board, or the courts, he could still prosecute on merits, but the computation of his profits from sales of property must be made on the old basis in conformity with Brewster vs. Gage, supra, and Dorothy Payne Whitney Straight, supra, and other decisions cited.

23 If the petitioner had filed his return under the new basis, his election would enable him to litigate his tax liability and he could properly plead that he had acted under a regulation which erroneously construed the law and ask for a redetermination on the basis finally established by judicial authority. It appears, therefore, that the

only purpose of section 702 (a) is to permit an estate within the specified categories to elect whether it will settle its tax liability as shown on a return filed in conformity with regulations temporarily effective at date of filing, but later abrogated, or decline to do so and ask for a redetermination under provisions judicially determined to be the law as such filing date.

It will be observed that section 702 (a) does not specifically include any reference to allowances for depletion and deduction. The parties have argued their respective contentions on the theory that it is not material whether the election grows out of a dispute over such allowance or over gain or loss from the sale of property. Since both are involved here, it is not now necessary to decide whether the subsection under review confers the right of election on those estates as to which the only dispute is over the correct basis for computing gain or loss. This proceeding calls for a determination of the proper basis for computing gain or loss on petitioner's sales of real estate in 1924 and 1925. We have determined that basis and it follows under section 204 (1) (b) of the Revenue Act of 1924 that allowances for depletion and depreciation must be computed in accordance therewith.

In each of the taxable years the respondent disallowed parts of the deductions claimed by the petitioner on account of salaries and expenses, on the theory that the rejected amounts fairly represent the ratable part of such charges which should be allocated to the management of portions of the estate distributed to the heirs of the decedent and also that some part of such charges was for the management of the "Hartley Family" account. The administration of the "Hartley Family" account was confined to the very simple procedure of receiving rents from the tenants of the four buildings which constituted the corpus of that gift and distributing the same to the beneficiaries. That service required only about three days in each month and for it the manager received a salary of $1,000 per year out of the family fund. Such salary was not claimed as a deduction by the petitioner and is not a basis for the disallowance of its expense claim.

The facts disclose that no part of the estate was distributed in 1924 and that the charges for expenses and salaries claimed as deductions in that year were necessary and reasonable in a business as complicated and extensive as

that of the petitioner. The determination of the re-
24 spondent in this respect for the year 1924 is reversed.

It is in evidence that the bulk of the Hartley estate was distributed by the proper court on February 27, 1925, but that such property continued to be managed by the executor's business organization. We conclude from this that petitioner has failed to overcome the presumptive correctness of the respondent's determination that one-half the charges for expenses and salaries in 1925 should be allocated to the management of distributed property then owned by the heirs of the decedent. The determination of the respondent in respect of salaries and expenses for the year 1925 is affirmed.

The petitioner has abandoned his contention that the annuity payments in 1924 and 1925 in the respective amounts of $186.15 and $17,500 are deductible from income in such years. On brief his counsel also concedes that respondent properly disallowed attorney's fees in the amount of $5,000 in the year 1924. It follows, therefore, that the determination of the respondent as to such claimed deductions must be affirmed.

No evidence has been adduced sufficient to enable us to determine that petitioner sustained any loss in 1923. The petitioner contends that the alleged loss resulted from the payment of estate taxes in such years. Even if the proof were sufficient to establish the amount of the loss, it could not be regarded as the basis for net loss to be carried forward in the determination of tax liability in any subsequent year. H. J. Schlesinger, 5 B. T. A. 943; Lawrence J. Montgomery, 17 B. T. A. 1308. On this issue the determination of the respondent is affirmed.

Reviewed by the Board.

Decision will be entered under Rule 50.

Arundell, Van Fossan, and McMahon concur in the result.

Morris dissents.

Murdock, dissenting: The period within which a claim for refund or credit may be effectively filed begins with the time the tax was paid. The findings of fact do not disclose when any tax was paid. Consequently, I cannot determine whether the election was timely filed on July 27, 1928. But assuming that it was timely filed, section 702. (a) of the Revenue Act of 1928 deals only with the computation of gain or loss and has nothing whatever to do with the basis for

depletion and depreciation. Some of the properties upon which depletion and depreciation are being claimed in this case were not sold and section 702 (a) can have no bearing upon the issue raised in connection with those properties.

The Board is not justified in reversing the Commissioner's disallowance of the salary deduction for 1924 on the facts found.

Goodrich agrees with this dissent.

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25 (Order of Redetermination, June 3, 1933.)

United States Board of Tax Appeals.

Estate of G. G. Hartley, Petitioner,
Docket No. 42343. vs.
Commissioner of Internal Revenue, Respondent.

Pursuant to the findings of fact and opinion promulgated March 15, 1933, the respondent filed a computation under Rule 50 on May 5, 1933. Due notice having been given to the parties and the proceeding having been called for settlement from the Day Calendar of May 31, 1933, at which time there was no objection to the computation filed, it is

Ordered and Decided: That there are deficiencies for 1924 and 1925 in the respective amounts of $1,745.47 and $12,640.

(Signed) W. C. LANSDON,
Member.

(Seal)

Enter:
Entered
June 3, 1933

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26 (Petition of Cavour Hartley, Executor, etc., for Review of Decision of United States Board of Tax Appeals.)

Filed August 25, 1933, United States Board of Tax Appeals.

United States Board of Tax Appeals.

Cavour Hartley, Executor of the Estate of G. G. Hartley, Petitioner,
Docket No. 42343. vs.
Commissioner of Internal Revenue, Respondent.

The above named petitioner, Cavour Hartley, Executor of the Estate of G. G. Hartley, is aggrieved by the decision of

the United States Board of Tax Appeals rendered against him on the 3rd day of June, 1933, in the case of Cavour Hartley, Executor of the Estate of G. G. Hartley, versus Commissioner of Internal Revenue, No. 42343 on the docket of the Board and respectfully submits his petition for review thereof by the United States Circuit Court of Appeals for the Eighth Circuit. For cause the petitioner respectfully shows as follows:—

Statement of Nature of the Controversy:

1. Petitioner is an individual as managing executor of the Estate of G. G. Hartley, Deceased, with his principal office at 740 East Superior Street, in the City of Duluth, Minnesota.

2. That on November 22, 1928, the respondent, Commissioner of Internal Revenue, determined a deficiency in income tax for said estate for the calendar year 1924 of $3261.02, and for the year 1925 the sum of $12,640.00, or a total deficiency of $15901.02. On the 15th day of January, 1929, the petitioner filed with the United States Board of Tax Appeals his petition for redetermination of said
27 deficiency and the respondent thereafter duly filed his answer to petitioner's petition. The questions in controversy before the Board of Tax Appeals were whether or not the respondent in his computation committed error:—

1st. In using the value of estate's properties at the date of decedent's death as his basis of computing gain or loss of capital assets and the allowance of depreciation or depletion of certain properties.

2nd. In reducing in amount or rejecting in full certain salary and expense items claimed as deductions from the gross income of the estate.

3rd. In denying deductions claimed on account of alleged net loss carried over from 1923.

All of the remaining assignments of error originally urged by the petitioner executor in his petition were abandoned and the cause by agreement submitted to the United States Board of Tax Appeals for decision upon the said three assignments of error.

The decedent, G. G. Hartley, died on the 11th day of January, 1922, leaving real, personal and mixed property of the approximate value of Three Million Dollars, producing an annual gross income of approximately Two Hundred Thousand Dollars. Included among the assets were some

fifteen (15) iron mines under leases on royalty bases and several thousand pieces of real estate, improved and unimproved, including farms and improved rental city properties; the personal property consisted of investment and income securities; the administration of the estate was difficult and prolonged and was still in process at the time of the filing of the petition for redetermination of the deficiency and this prolongation of the time was largely the result of a series of claims for income tax made against the decedent and against the estate and which proved to be largely unfounded; during this period of administration it was
28 necessary for the petitioner to operate the business of the estate and in the conduct of the business of the estate the petitioner, as managing executor of the estate, maintained the same office organization used by the decedent in the conduct of his business, which organization was supervised by a general office manager, who, in turn, employed an assistant, bookkeepers, stenographers and an engineer who had supervision of the collection of royalties on the iron mines. The decedent had some years prior to his death set aside a group of income properties to his family, which properties consisted of four buildings and were carried in an account designated "Hartley Family" and the income therefrom, consisting of rentals, was paid by the business manager to the members of the Hartley Family and for this service he was paid One Thousand Dollars ($1,000.00) annually out of the Hartley Family income. The office manager devoted not more than three days in each month to such work. There was a partial distribution made of the assets of the estate by the Probate Court on February 24, 1925, which distribution included property of the approximate value of Two Million Dollars. The executor maintained intact the decedent's organization and carried on the business in the same manner that it had been conducted by the decedent and the office organization continued to manage the distributed property after the distribution was made.

In the petitioner's income tax return for the years 1924 and 1925 the executor claimed certain deductions from gross income as follows:—

For the year 1924:	
Salaries	$23,535.13
Annuities	4,000.80
Expenses	2,633.60
Attorneys' fees	5,000.00
Accountants' fees	2,000.00

For the year 1925:

Salaries	$21,533.34
Annuities	17,500.00
Expenses	2,054.59
Attorneys' fees	.....
Accountants' fees	2,263.14

29 Of these deductions the respondent disallowed the following:—

For the year 1924:

Salaries	$ 7,192.57
Annuities	186.15
Expenses	1,316.80
Attorneys' fees	5,000.00
Accountants' fees	1,400.21

For the year 1925:

Salaries	$ 6,191.67
Annuities	17,500.00
Expenses	1,027.30
Accountants' fees	1,663.14

In his income tax returns for 1924 and 1925 the petitioner deducted the sums of $75,100.69 and $52,820.57, as alleged net losses brought forward from 1923 which the respondent has disallowed. The petitioner in his income tax returns for the years 1924 and 1925 reported a loss for the year 1924 in the sum of $1184.39 and a gain for the year 1925 in the sum of $255.05, resulting from the sale of capital assets; for the year 1924 petitioner claimed deduction on account of depletion of iron mines in the sum of $41,663.62, and for the year 1925 in the amount of $67,272.81; and also claimed deductions on account of depreciation of rental property in amounts that are not in controversy here. The petitioner in making such deductions conformed to Article 343 of Regulation 69 in effect at the date of the respective filings, which regulations provided that the basis for computing gains or loss on the sale of property and the depreciation should be the appraised value of the various properties at the date of the decedent's death. Upon audit the respondent made numerous adjustments of profit from sales and of depletion and depreciation and determined the deficiency in controversy. The petitioner on July 27, 1928, filed with the Commissioner his written election not to have the income tax returns of the estate governed by the provisions of subsection 702 (a) of the Revenue Act of 1928. Under date of March 16, 1933, the

Board of Tax Appeals promulgated its opinion. In the
30 determination of the deficiencies involved herein the basis used by the petitioner in his original returns were accepted by the respondent and no controversy on the facts was in issue upon this proposition. The Board decided the question as one of law and held that the basis for determining gain or loss in the sale of assets and depletion or depreciation of same in hand of the executor of an estate should be the fair market value of the property at the time of the death of the decedent.

The Board reversed the determination of the respondent in respect to deductions on account of salary and expenses for the year 1924 and affirmed the determination of the respondent in respect to the deductions on account of salaries and expenses for the year 1925 on the ground that the petitioner had failed to overcome the presumptive correctness of respondent's determination that one-half of the charges for expenses and salaries for 1925 should be allocated to the management of the distributed property. The Board affirmed the determination of the respondent on the issue of carrying forward the losses for the year 1923 and held that there was no evidence sufficient to enable the Board to determine that the petitioner sustained any loss in 1923, and even if proven it was not such as could be regarded as a basis for net loss to be carried forward in any subsequent year. Thereafter, and on June 3, 1933, the Board entered its formal decision redetermining the deficiency to be $1745.47 and $12,640.00 for the years 1924 and 1925 respectively.

Assignments of Error.

The petitioner believes and avers that errors were committed by the Board to his damage and prejudice as follows:

1. Entering judgment for respondent.

2. Failing to enter judgment for petitioner.

3. In redetermining the deficiency of $1745.47 for the year 1924, and $12,640.00 for the year 1925.

4. In holding as a matter of law that the basis for determining capital gains or losses and depreciation and depletion in the hands of the estate, shall be the fair market value of the property at the time of the decedent's death.

31 5. In failing to hold that the basis for determining gain from the sale of capital assets of the estate and for depreciation and depletion should be that to which the decedent was entitled in his lifetime.

6. In using the so-called "old basis" instead of the "new basis" in determining gain or loss from the sale of capital assets by the estate.

7. In holding that one-half of the charges for expenses and salary for the year 1925 should be allocated to the management of the distributed property, and in holding that the petitioner had failed to overcome the presumptive correctness of respondent's determination.

8. In holding the evidence insufficient to establish losses for the year 1923.

9. In holding that any losses for the year 1923 should not be carried forward in the determination of the tax liability in the subsequent years.

Wherefore, Your petitioner prays that the decision of the United States Board of Tax Appeals entered herein against him be reviewed and reversed by the United States Circuit Court of Appeals for the Eighth Circuit and that the Clerk of the Board of Tax Appeals be directed to transmit and deliver to the Clerk of said Court certified copies of all the documents necessary and material to the presentation and consideration of the foregoing Petition for Review, and as required by the rules of said Court and statutes made and provided; and your petitioner prays for such other and further relief as the Court may deem proper in the premises.

H. B. FRYBERGER,
H. C. FULTON,
E. L. BOYLE,
WILLIAM B. FRYBERGER,
Attorneys for Petitioner.

32 State of Minnesota,
County of St. Louis—ss.

Cavour Hartley, being duly sworn, says that he is the petitioner above named and the Executor of the Estate of G. G. Hartley, Deceased; that he has read said Petition for Review and is familiar with the statements therein contained; and that the facts therein stated are true, except such facts as may be stated on information and belief, and those facts he believes to be true.

(s) CAVOUR HARTLEY.

Subscribed and sworn to before me this 22 day of Aug., 1933.

(s) KATHERINE STEENBUCH,
(Notarial Seal) Notary Public, St. Louis County, Minn.

My Commission Expires June 7, 1939.

32a (Notice of Filing of Petition for Review by Cavour Hartley, Executor, etc., and Acknowledgment of Service.)

Filed September 1, 1933, United States Board of Tax Appeals.

Please Take Notice: That counsel for the petitioner has filed with the Clerk of the United States Board of Tax Appeals, his petition for a review, by the United States Circuit Court of Appeals of the Eighth Circuit, of the decision of the United States Board of Tax Appeals in the above entitled proceeding, a copy of which petition is enclosed herewith and hereby served upon you.

(s) CAVOUR HARTLEY, Executor of THE ESTATE OF G. G. HARTLEY, Petitioner.

(s) H. B. FRYBERGER,
(s) H. C. FULTON,
(s) E. L. BOYLE,
(s) WILLIAM B. FRYBERGER,
Attorneys for Petitioner.

To:
E. Barrett Prettyman,
General Counsel,
Bureau of Internal Revenue,
Washington, D. C.

Service of a copy of the foregoing is hereby acknowledged this 25th day of August, 1933.

(s) E. BARRETT PRETTYMAN,
General Counsel,
Bureau of Internal Revenue,
Attorney for Respondent.

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33 Statement of Evidence.

Filed January 15, 1934, U. S. Board of Tax Appeals.

In the United States Circuit Court of Appeals for the Eighth Circuit.

Cavour Hartley, Executor of the Estate of G. G. Hartley, Petitioner,

(B. T. A. No. 42343) vs.

Guy T. Helvering, Commissioner of Internal Revenue, Respondent.

The following is a statement of evidence in narrative form in the above entitled cause. This cause came on for hearing before Hon. William C. Lansdon, Member of the United States Board of Tax Appeals, on July 26, 1932. Frank W. Wilson, Esq., and H. B. Fryberger, Esq., appeared for the petitioner and C. M. Charest, General Counsel, Bureau of Internal Revenue, appeared for the respondent: (See footnote.)

Note: As used herein "petitioner" refers to the taxpayer and "respondent" refers to the Commissioner.

34 Counsel for the parties stipulated orally before the member sitting at the hearing

1. That the correct value of the properties at the date of the death of decedent is correctly shown by the deficiency notice, copy of which is attached to the petition.

2. That the deductions for depreciation, depletion, and the profit and losses on sales, computed on the basis to which the decedent would have been entitled had he been alive during 1924 and 1925, namely, cost or fair market value as of March 1, 1913, are shown on petitioner's Exhibit 1, attached hereto and hereby made a part of this statement.

3. That the figures being undisputed, both parties submitted to the board the legal question of whether the basis for determining depreciation, depletion and gain or loss should be the value of the property at the date of the death of decedent, as claimed by respondent, or that the basis should be that which decedent, had he lived, would have been allowed, as claimed by the petitioner.

4. That petitioner abandoned the issue regarding annuities, which is subparagraph (c) of paragraph 4 of the petition.

5. That the petitioner abandoned its contention, which was a part of subparagraph (d) of paragraph 4 of the petition, that the Commissioner erred in disallowing $5,-
35 000.00 paid for attorney's fees as a deduction from petitioner's income, petitioner admitting that said fee was for services in connection with the corpus of the estate.

6. That the Board should decide the question of law as to whether the estate was operating in such a manner of business as to be entitled to the net loss provision of the statute, and whether or not the item is such as should enter into that computation, and if it should become necessary to determine

the amount of this loss that they could agree, under Rule 50, as to the amount of the loss. That when the Board decided the law, counsel could then, if necessary, settle the facts under Rule 50.

MR. WILLIAM H. BURRIS, called as a witness by and on behalf of the petitioner, after being duly sworn, testified as follows:

Direct Examination.

My name is William H. Burris and I was employed by G. G. Hartley since 1890, up to the time of his death. After his death I worked for the estate of G. G. Hartley throughout the entire period of administration as general office manager and am still so employed. I was familiar with the duties of the employes of said estate for the years 1924 and 1925. I devoted my time to the business of the estate and also to other matters and was paid by the estate the salary stated in the income tax return of the estate. I received salary also from other people. During said time there was in the em-
36 ploy of the estate, H. L. Hartley, William E. McLeod and, I believe, Mr. Lathan, and also certain stenographers and the time of all of these parties was devoted to looking after the property and affairs of the estate. The first decree of distribution of the estate is the partial decree of distribution. A certified copy of this partial decree was offered and received in evidence as petitioner's exhibit 2, a copy of which is hereto attached and made a part of this statement of evidence. Later a final decree was entered—I think about 1928.

In addition to salaries paid by the estate there were certain expenses for travel, stationery, telephone, telegraph and that sort of thing incurred in connection with the property of the estate, in the amount of $1,316.80 for the year 1924, and $1,027.30 for the year 1925. This was while the property was in the possession of the executor.

Cross-Examination.

I went with Mr. Hartley first in 1890 and ever since about 1906 I have been looking after the work, books and everything else, general office work. There was no real estate distributed to the heirs until 1928, except one iron mine and that was leased to a corporation which paid royalties every three months, and an engineer looked after this property. We did not turn over the property to the heirs until 1928, and up to

that time they were exercising authority over it as executors and not as individuals.

In addition to the property of the estate there was an account called the "Hartley Family" consisting of property which Mr. Hartley gave to his children five or ten years
37 before his death, and I looked after that and was paid for looking after that. This was paid separate from the estate. It was choice income bearing property. Mr. Hartley thought when he first started this account that $1,000.00 a year would be about right to pay me and that is what they have paid me ever since. I was paid $5,000.00 a year for my services to the estate. I kept no separate account of my time but the property of the "Hartley Family" consisted of four buildings and the tenants bring in the rent, paying it into the office. There was no bother collecting it, as buildings of that kind were at a premium and we had no trouble. It did not take more than three days out of the month. While the estate business took from half past eight until half past five each day, except vacation.

Redirect Examination.

Up to the date of the partial final decree, which was dated on the 24th day of February, 1925, the estate had all of the property still in the hands of the executors. The Holman Mine was the only real estate which was distributed under this partial final decree.

Mr. Frank W. Wilson, called as a witness by and on behalf of the petitioner, after being duly sworn, testified as follows:

Direct Examination.

I am a public accountant and have had charge of the accounting in making up the returns in the Hartley Estate from time to time and am familiar with the returns and the figures of the estate. An election was made in writing with reference to the returns for 1924; under the provisions of Section 702 of the Revenue Act of 1928, I filed with the Commissioner of Internal Revenue, the election of the executor
38 of the estate of G. G. Hartley, not to come within the provisions of sub-section A of said Section 702 of the Revenue Act of 1928. I filed that election on July 27, 1928, and for all years prior to the date of filing election. The accountant's fees for the years 1924 and 1925, noted in the returns, were for services rendered almost altogether in connection with the current affairs of the estate as accountant

and income tax advisor and the amounts are set forth in the sixty day letter accompanying the petition. I was engaged during this period, to a considerable extent, in looking over the tax matters of Mr. Hartley, prior to his death, and the final settlement of those old cases came before the Board of Tax Appeals, I think, largely about 1928, and my services in that connection were paid principally at the conclusion of the contest on those cases.

CAVOUR HARTLEY, called as a witness by and on behalf of the petitioner, after being duly sworn, testified as follows:

Direct Examination.

I was the managing executor of the estate of G. G. Hartley from its inception until its final closing. I was employed in the office of my father prior to his death and was familiar with his business activities. My father's principal business was mining and real estate. He was interested in from ten to fifteen iron mines which produced a large amount of revenue from year to year. He also held large real estate holdings other than mining interests and there was considerable income from those holdings. There were several thousand of these holdings. My father maintained an office for
39 the operation of his business and employed a number of assistants and devoted all his business hours to these things and all his income was derived from his real estate and mining business and income from money that he had made from that business and invested.

After my father's death myself and the other executors continued to operate the business as my father had done and that continued until the final decree and we continued to employ the office help in the same way that he had done and maintained the office.

Cross-Examination.

The property of the estate was largely distributed in kind, though there may have been a few sales and the business of the respective properties was conducted by the executors until the distribution. There was no change in the conduct of the business connected with the properties after my father's death and up to the time of distribution, except that we tried a little harder to convert the properties into cash and were unable to do so, except in a few exceptional cases. It went along about the same as if my father had been there, except that he probably had more wisdom.

(Approval of Statement of Evidence by Counsel.)

The foregoing evidence is all of the material evidence adduced at the hearing before the Board of Tax Appeals, and the same is approved by the undersigned, E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue, as attorney for the Commissioner of Internal Revenue.

E. BARRETT PRETTYMAN,
General Counsel, Bureau of
Internal Revenue.

40 The foregoing is all of the material evidence adduced at the hearing before the Board of Tax Appeals, and the same is approved by the undersigned, as attorneys for the petitioner on review (respondent on cross-review).

H. B. FRYBERGER,
H. C. FULTON,
WILLIAM B. FRYBERGER,
E. L. BOYLE,
Attorneys for Petitioner on Review
(Respondent on Cross-Review).

(Approval of Statement of Evidence by Member of United States Board of Tax Appeals.)

The foregoing is all of the material evidence adduced at the hearing and in order that the same may be preserved and made a part of the record, this statement of evidence is duly approved and settled this 15th day of January, 1934.

W. C. LANSDON,
Member, United States Board of
Tax Appeals.

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41 (Petitioner's Exhibit 1.)

Admitted in Evidence July 26, 1932, U. S. Board of Tax Appeals.

Treasury Department
Internal Revenue Service
St. Paul, Minn.

Dec. 6-1927

Office of
Internal Revenue Agent in Charge

Estate of G. G. Hartley,
Cavour Hartley, Executor,
740 East Superior St.,
Duluth, Minn.

In re: Estate of G. G. Hartley,
Duluth, Minn.

Date of report: Nov. 16, 1927

Years covered: 1924 to 1926, inclusive.

Dear Sir:

There is attached a statement of adjustments which this office proposes to recommend, affecting your income tax liability, and a form of waiver of your right to file a petition with the United States Board of Tax Appeals. If a deficiency is indicated and the adjustments suggested with respect thereto are satisfactory, and you desire that the recommendations be forwarded promptly to the Bureau at Washington for review and final determination, the waiver should be signed and forwarded to this office. Interest is payable on deficiencies found due as set forth on the attached form 882.

If you do not agree with the conclusions set forth in the inclosed statement it is desired that every opportunity be afforded you to present to this office any objections or additional information. You are accordingly granted thirty days from date of this letter within which you may, if you so desire, protest the proposed adjustments. The protest and any additional statement of facts must be submitted to this office, executed in triplicate under oath, and should contain the following information:

(a) The name and address of the taxpayer (in the case of an individual the residence, and in the case of a corporation the principal office or place of business); (b) in the case of a corporation the name of the State of incorporation; (c) the designation by date and symbol of the letter advising of the proposed deficiency with respect to which the protest is made; (d) the designation of the year or years involved and a statement of the amount of tax in dispute for each year; (e) an itemized schedule of the findings to which the taxpayer takes exception; (f) a summary statement of the grounds upon which the taxpayer relies in connection with each exception; and (g) in case the taxpayer desires a hearing, a statement to that effect.

If a protest is filed it will be given careful consideration in this office before the recommendations are forwarded to

Washington for action. In the event that you do not protest within the thirty-day period, the case will be forwarded immediately thereafter to the Bureau at Washington for Review.

In the event the recommendations are not approved upon review in Washington, you will be notified and given opportunity to discuss the changes with this office, or should you fail to protest to this office, any protest which you may subsequently file with Washington will be referred to this office for consideration.

If a deficiency is indicated no remittance should be made until you receive notice of assessment from the Collector of Internal Revenue for your district.

Please acknowledge receipt by return mail.

Respectfully,

G. W. KURTZ,
Internal Revenue Agent in Charge.

Inclosures:
Copy of report
Agreement form
Receipt
Form 850
Revised July, 1926

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Estate of G. G. Hartley,
Duluth, Minnesota.

Date of Report:
(Duluth, Minnesota)
Nov. 16, 1927.

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K, Computation of 3/1/1913 value of lots sold

Preliminary Statement
Summary

Years	Additional tax	Overassessment
1924	207.63	—
1925	1,809.70	—
1926	—	—
		—
Net additional tax	$2,017.33	

Principal Causes of Additional Tax. Due to disallowance of 1923 net loss erroneously claimed as a deduction against years 1924 and 1925. Additional deductions, however, were allowed for these years as shown in following schedules, so that the net additional tax is considerably reduced from what it would be if the net loss had been the only adjustment.

Person With Whom Findings Were Discussed: Mr. Frank W. Wilson, accountant, for the Hartley Estate, was informed of all changes made in this report. He desired to review the report further before recommending agreement.

Business Connections: None.

Status and Reason for Exemption: Exemption of $1,000.00 allowed for 1924 and $1,500.00 for each of the years 1925 and 1926.

Important Features and Other Information: None.

Estate of S. A. Darling

Schedule [illegible]

BLOCK ADJUSTMENTS

Rate Income	(4,500.00)			3,105.00	(1,395.00)
Interest	895.00				895.00
Depr. & Depletion	10,000.00			10,000.00	20,000.00
Profit sales	(1,500.00	5,700.00			4,200.00
Other Income		1,000.00			1,000.00
Total Income	95,845.00	6,700.00	10,000.00	13,105.00	104,950.00
Taxes paid	20,000.00				20,000.00
Interest	1,500.00	300.00			1,200.00
Contributions	3,000.00	3,000.00			
Other deductions	110,000.00	90,106.33			88,076.01
Total deductions	134,437.15	93,506.33			99,915.00
Net Income	(38,000.00)	100,797.00		23,105.00	4,150.67
Total income					

Estate of O. O. Bartley

EXPLANATION OF AUDITOR CHANGES

Item 2. Income from business:

Loss from farm operations per return	(86,580.28)
Corrected loss from farm operations	(3,465.42)
Difference	(3,114.86)

The above net loss was sustained from the operation of the Island and Allendale farms, which were a part of the estate property. The receipts and allowable expenses for the year 1926 were as follows:

Total receipts from farm operations		$30,085.19
Allowable Expenses	25,299.41	
Depreciation Exhibit A	8,865.80	34,165.21
Corrected net loss		3,465.42

The difference of $3,114.86 is due entirely to a change in depreciation as per Exhibit A.

Item 3. Interest:

Reported on return	2,051.66
Corrected	2,051.66
Difference	None

Item 5. Rents and Royalties:

Reported on return	102,869.53
Corrected	66,997.72
Difference	35,871.81

The difference of $35,871.81 consists of the following items:

Depreciation on rental property additional as per Exhibit F	1,8113.08	
Depletion additional per Exhibit I	33,4758.73	
Total additional depreciation and depletion		36,871.81

The corrected net income from rents and royalties was computed as follows:

Items	Amount Received	Depreciation & depletion	Expenses	Net Income
Rentals	827,651.47	9,530.98	7,660.59	14,460.60
Royalty Items				
Mines	127,699.53	76,102.41		51,517.12
Rentals	155,333.00	81,652.88	7,660.59	65,997.72

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Estate of G. G. Hartley

Schedule 1-a (continued)

Explanation of Items Changed

Depreciation was allowed on March 1, 1913, value of property, or on cost if acquired subsequent to 3/1/1913, in accordance with T. D. 4011. Depletion was also allowed on basis established for the decedent as per Valuation Report by Metals Section of April 20, 1924 (IT: En:M:WCG)

Item 6, Profit from Sales:		
Report on return	Loss	($1,184.39)
Corrected		4,599.29
	Difference	5,783.68

The difference of $5,783.68 as shown above is due principally to a change in basis from the Appraised value at time of decedent's death, to original cost or March 1, 1913, value. The computation of the corrected profit is shown in Exhibit J.

Item 7, Dividends:	
Reported on return	None
Corrected	None
Item 8, Liberty Bond Interest, taxable	
Reported on return	None
Corrected	None
Item 9, Other Income:	
Reported on return	None
Corrected	1,092.84
Difference	1,092.84

The above income was derived from a transaction known as "Wisdom Lot Account," and consists of taxpayer's profit for acting as agent in the sale of lots. Computations are as follows:

Gross receipts 1924	5,602.40
Expenses	1,231.03
Gross profit	4,371.37
¾ of profit to owner	3,278.53
¼ to taxpayer	1,092.84
Item 12, Taxes:	
Reported on return	32,650.23
Corrected	32,650.23
Difference	None

The above item consisted of real estate, personal property, and other miscellaneous taxes paid during the year by this estate.

46 Item 13, Losses:

Claimed on return	$1,507.58
Corrected	1,182.58
Difference	325.00

The above loss was computed as follows:

Wrecking Allendale and Norris houses condemned by building inspectors.

Cost	1,000.00
Cost of wrecking	1,258.08
Total cost	2,258.08
Loss depreciation sustained per Exhibit A and Exhibit D	325.00
Depreciated cost	1,933.08
Loss salvage	750.50
Net loss	1,182.58

Item 15, Contributions:

Claimed on return	3,000.00
Allowed	None
Difference	3,000.00

This item is a payment made to St. Luke's Hospital on account of a subscription made by decedent. Since his will did not direct that this amount be paid out of income, it is here disallowed. ARR 280 CB No. 3, p. 203.

Item 16, Other deductions:

Claimed on return	112,270.34
Allowed	22,074.01
Difference	90,196.33

The difference of $90,196.33 was computed as follows:

Item	Claimed on Return	Allowed	Difference
Salaries	23,535.13	16,342.56	7,192.57-
Annuities	4,000.80	3,814.65	186.15
Expenses	2,633.60	1,316.80	1,316.80
Attorney fees	5,000.00	—	5,000.00
1923 Net loss	75,100.60	—	75,100.60
Accountants fees	2,000.21	600.00	1,400.21
Totals	112,270.34	22,074.01	90,196.33

47 Salaries were computed as follows:

Total to office employees	$14,385.13
To H. H. Hartley Island Farm Mgr.	9,150.00
Total	23,535.13
½ of office salaries disallowed as this is applicable to property distributed to heirs on January 1, 1924	7,192.57
Balance allowable	16,342.56

Annuities as provided for in the will and in the decree of partial distribution were as follows:

To Wm. Smith	100.00
B. F. Hartley	100.00
W. W. Hartley	1,200.00
Mary Rogers	1,200.00
Mrs. C. E. Hartley	15,000.00
Total	17,600.00

Since these annuities were to be paid out of interest received from Liberty Bonds and Northern Pacific Bonds set up for that purpose, only the excess not covered by these interest allowances will be deductible as follows:

Total interest received (N. P. Bonds)	$2,250.00—
" " Liberty Bonds	14,535.35—
	16,785.35
Annuities to Wm. Smith, B. F. Hartley, W. W. Hartley and Mary Rogers to be paid entirely out of Liberty Bond Interest as provided for in the will	2,600.00
Balance available for annuity to Mrs. Hartley	14,185.35 √
Amount paid to Mrs. Hartley	15,000.00
Excess deductible as being paid out of ordinary income	814.65
Add Additional allowance made by court for maintenance of home	3,000.00
Total paid to Mrs. Hartley out of ordinary income and therefore deductible	3,814.65 √

48 Item 16, Other deductions continued

Expenses of $2,633.60 are proportioned half and half between the estate and the heirs, on account of this proportion being expended and paid for by the estate in the collection of income and care of property which had been distributed to the heirs of this estate on January 1, 1924.

Attorney fees are disallowed in the amount of $5,000.00 as these fees were paid in connection with the administration of the estate.

O. D. 537, CB 2 — 175.

The 1923 net loss is not deductible from income of subsequent years as this loss was not a statutory net loss as contemplated in Section 206 of the Revenue Act of 1924. (This loss was sustained through the payment of Federal Estate taxes in 1923.)

1T: 1803 Dec. 1923 CB p 86 BTA Dec 2069 (5 BTA 943)

Accountant's fees are proportioned between administration and current work as follows:

Allowed for current estate work	$600.00
Disallowed as being administrative work in connection with income tax of decedent and Federal Estate Tax	1,400.21
Total	2,000.21

49 Treasury Department
Internal Revenue Service
Form 886P—Jan. 1927

Name of Taxpayer Estate of G. G. Hartley

Schedule No. 2 Year / ~~Period~~ } ended Dec. 31, 1924

Computation of Tax—1924 and Subsequent Years

Income Tax

Net income (from Schedule....)		$ 8,190.67
Less: Net loss (section 206)	$.....	
Capital net gain	.....	.....
Income subject to surtax		$.....
Less: Dividends	$.....	
Interest on Liberty Bonds, etc	.....	
Personal exemption and credit for dependents	1,000.00	1,000.00
Balances subject to normal tax		$ 7,190.67
Normal tax at 2 on $4,000.00	$ 80.00	
Normal tax at 4 on $3,190.67	127.63	
Normal tax at .....on $	.....	
Surtax on .....$	.....	
Tax at 12½% on capital net gain of $	.....	$.....
Fiscal year income from partnerships, etc.:		
Normal tax at .....on $	$.....	
Normal tax at .....on $	.....	
Normal tax at .....on $	.....	
Surtax on .....$	.....	.....
Total tax		$ 207.63

Less: Credit of 25% for earned net income (from Schedule..)	$.....	
Income tax paid at source	.....	
Taxes paid to a foreign country	.....	.....
Total tax assessable		$ 207.63
Tax previously assessed		None
Additional tax to be assessed (~~over assessment~~)		$ 207.63

TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
FORM 888 J—Rev. July, 1937

Name Estate of S. B. Hartley

Schedule No. 3

1937

BLOCK ADJUSTMENTS

		Return	Additions to Income	Deductions from Income	Corrected	Wife's Income
1						
2	Farm Income	(17,250 61)	2,997 71		(14,252 90)	
3	Interest	5,056 69		2,843 90	2,212 79	
4						
5	Rents and Royalties	117,717 89		33,783 31	83,934 58	
6	Profit sales	255 05	906 11		1,161 16	
7						
8	L. B. Interest	18,399 00		18,399 00		
9	Other income	2,565 01			2,565 01	
10	Total Income	128,728 63	3,903 82	50,826 21	75,800 24	
11						
12	Taxes paid	30,891 70			30,891 70	
13						
14						
15						
16	Other deductions	96,171 68	79,202 66		16,968 96	
17	Total	127,063 38	79,202 66		47,860 66	
18	Net Income	(4,340 75)	483,105 50	50,826 21	27,939 58	
			3,903.82	33783.31		
			906.11	3902.67		
					23,453.16	
					1,124.73	
	TOTAL INCOME,					

Wife's net gain or loss _____ $ _____

Husband's net income or loss $ 27,939.58

1-8

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Schedule 3-A

Explanation of Items Changed

Item 2, Income from Business:

Reported on return, loss on farm operation	$17,250.61
Loss corrected	14,252.90
Difference	2,997.71

The above net loss was sustained from the operations of the Island and Allendale Farms, which were a part of the estate property. The receipts and allowable expenses for the year 1925 were as follows:

Total receipts from farm operation		$19,064.58
Expense allowable	30,617.83	
Depreciation as per Exhibit A	2,699.65	33,317.48
Corrected net loss		(14,252.90)

The difference of $2,997.71 is due entirely to a change in depreciation as per Exhibit A. In this report the cost on March 1, 1913, value to the decedent is used as a basis, instead of the appraised value at date of death as used in the return.

Item 3, Interest: Reported on return		5,056.69
Corrected		2,412.79
Difference		2,643.90

The difference of $2,643.90 consists of interest which was used in paying annuities as provided in the decree of partial distribution made by the Probate Court as of January 1, 1924. This decree provided for the setting aside of certain bonds the interest of which would be sufficient to pay annuities of $17,500.00. Interest was received as follows:

4¼% Liberty Bond interest		16,736.50
From the above are paid the following annuities:		
W. W. Hartley	1,200.00	
Mary Rogers	1,200.00	
Wm. Smith	100.00	2,500.00
Balance		14,236.50
Northern Pacific Bond Interest		3,046.28
Total		17,282.78

(Amount available to pay annuity of $15,000.00 to Mrs. C. E. Hartley)

52 $3,046.28 is 17.626% of $17,282.78

Therefore 17.626% of $15,000.00 was paid out of taxable N. P. Bond interest, or $2,643.90.

$3,046.28 less $2,643.90 is $402.38 amount taxable. The excess liberty bond interest was less than exemption allowed and there is none taxable.

Reconciliation:

Ordinary interest received on notes, etc.	$2,010.41
Plus excess N. P. Bond interest	402.38
Corrected interest	2,412.79

Item 5, Rents and Royalties

Reported on return	117,717.49
Corrected	83,934.18
Difference	33,783.31

The difference of $33,783.31 consists of the following items:

Additional depreciation on rental Buildings as per Exhibit F	1,813.02
Additional depletion per Exhibit I	31,970.29
Total additional depreciation and depletion	33,783.31

The corrected net income from rents and royalties was computed as follows:

Items	Amount received	Depreciation & Depletion	Expenses	Net Income
Rentals	28,002.82	5,530.28	4,183.27	18,289.27
Royalties and Iron Mines	164,888.01	99,243.10		65,644.91
Totals	192,890.83	104,773.38	4,183.27	83,934.18

Depreciation and depletion are allowed on same basis as to the decedent, instead of on appraised values on date of death.

53 Explanation of Items Changed

Item 6, Profit from sales:

Reported on return	255.05
Corrected Exhibit J	1,161.16
Difference	906.11

The difference of $906.11 as shown above was due to a change of basis. In the return the appraised values on date of death was used, whereas in this report the original cost basis or March 1, 1913, value was used. Reg. 69, Art. 243.

Item 7, Dividends:

Reported on return	None
Corrected	None
Difference	None

Item 8, Liberty Bond Interest

Reported on return	14,399.00
Corrected	None
Difference	14,399.00

The difference of $14,399.00 consists of Liberty bond interest which has been eliminated as being non taxable and for payment of annuity to Mrs. C. E. Hartley as explained under item 3 above

Item 9, Other income:

Reported on return	2,545.01
Corrected	2,545.01
Difference	None

Other income consisted of the following items and was found to be correctly reported.

Profit on Wisdom Lot contract	2,520.01
Recoveries of former losses	25.00
Total	2,545.01

Item 12, Taxes:

Reported on return	30,891.70
Corrected	30,891.70
Difference	None

Taxes as reported were found to be correct.

54 Item 16, Other deductions:

Reported on return	$96,171.64
Corrected	16,968.96
Difference	79,202.68

The difference of $79,202.68 was computed as follows:

Items	Claimed on return	Allowed	Difference
Salaries	21,533.34	15,341.67	6,191.67
Annuities	17,500.00	—	17,500.00
Expenses	2,054.59	1,027.29	1,027.30
1923 Net Loss	52,820.57	—	52,820.57
Accountants fees	2,263.14	600.00	1,663.14
Totals	96,171.64	16,968.96	79,202.68

Salaries were computed as follows:

Office salaries	$12,383.34
H. H. Hartley Mgr. Island Farm	9,150.00
Total salaries	21,533.34
½ of office salaries applicable to income collected for heirs	6,191.67
Balance allowed as deduction	15,341.67

The above division of salaries was made due to the fact that the same office force was employed to collect and take care of income from property belonging to the heirs. One half has been allocated as applying to the estate business.

Annuities of $17,500.00 are eliminated here, since these annuities were paid from Liberty bond interest and Northern Pacific bond interest as specified in a decree of the probate court. See items 3 and 8 above.

Expenses of $2,054.59 were apportioned half and half between the estate and the heirs. These expenses applying to both of these interests.

The 1923 net loss is disallowed for same reasons as set forth under item 16 in Schedule 1-a.

55 Accountants fees are allowed in the following proportions as between current work and work in connection with decedent's income tax and Estate Federal taxes, these latter items being administration expenses and not allowable as a deduction:

Allowed for current work in connection with Estate tax returns	$600.00
Disallowed as being administration expenses in connection with income tax of decedent and Federal Estate Tax	1,663.14
Total	2,263.14

56 Treasury Department
Internal Revenue Service
Form 886P—Jan., 1927
Name of Taxpayer Estate of G. G. Hartley
Schedule No. 4 Year / Period } ended Dec. 31, 1925

Computation of Tax—1924 and Subsequent Years
Income Tax

Net income (from Schedule....)	$27,939.58
Less: Net loss (section 206) $.....	
Capital net gain	

Income subject to surtax		$ .....
Less: Dividends	$	
Interest on Libery Bonds, etc	.....	
Personal exemption and credit for dependents	1,500.00	1,500.00
Balances subject to normal tax		$26,439.58
Normal tax at 1½ on $ 4,000.00	$ 60.00	
Normal tax at 3 on $ 4,000.00	120.00	
Normal tax at 5 on $18,439.58	921.98	
Surtax on $27,939.58	715.77	
Tax at 12½% on capital net gain of $	.....	$ .....
Fiscal year income from partnerships, etc.		
Normal tax at .....on $	$	
Normal tax at .....on $	.....	
Normal tax at .....on $	.....	
Surtax on .....$	.....	.....
Total tax		$ 1,817.75
Less: Credit of 25% for earned net income (from Schedule..)	$	
Income tax paid at source	8.05	
Taxes paid to a foreign country	.....	8.05
Total tax assessable		$ 1,809.70
Tax previously assessed		None
Additional tax to be assessed (~~over-assessment~~)		$ 1,809.70

TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
Form 886 J—Rev. July, 1927

Name Estate of S. S. Hartley

Schedule No. 5

1926

BLOCK ADJUSTMENTS

	Return	Additions to Income	Deductions from Income	Corrected	Wife's Income
1					
2 Farm Income	(12,995 04)	3,185 85		(9,809 99)	
3 Interest	3,758 31		2,031 60	1,726 71	
4					
5 Rents and Royalties	53,827 97		11,765 02	42,062 95	
6 Profit sales	4,628 37		76 65	4,551 72	
7					
8 L. T. Interest	20,375 35		15,468 40	4,906 95	
9 Other income	2,890 60	13 12		2,903 72	
10 Total income	72,484 76	3,198 97	29,341 67	46,342 06	
11 Interest paid	7,621 75			7,621 75	
12 Taxes paid	57,699 81			57,699 81	
13					
14					
15					
16 Other deductions	37,873 12	19,118 75		18,354 37	
17 Total	102,794 68	19,118 75		83,635 93	
18 Net income	(30,309 92)	22,317 72	29,341 67	(37,293 87)	
TOTAL INCOME,					

Widow's net gain or loss _____ $ _____

Husband's net income or loss _____ $ (37,293.87)

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58 Schedule 5-a

Explanation of Items Changed

Item 2, Income from Business:

Reported on return Loss Farm operation	($12,995.84)
Correct loss	(9,809.99)
Difference	3,185.85

The above net loss was sustained from the operation of the Island and Allendale Farms. The receipts and allowable expenses as corrected are as follows:

Total receipts		25,665.71
Allowable expenses	32,776.05	
Depreciation Ex. A	2,699.65	35,475.70
Net loss		9,809.99

The difference of $3,135.85 is due entirely to depreciation as shown in Exhibit A. This being due to a change in basis, from the appraised value as used in the return, to the original cost or March 1, 1913, value as used herein.

Item 3, Interest:

Reported on return	3,758.31
Corrected	1,726.71
Difference	2,031.60

The difference of $2,031.60 consists of interest which was used in paying annuities to Mrs. C. E. Hartley as provided for in a decree of Probate Court. Since both Liberty Bonds and Northern Pacific Bonds were set aside by the Court for this purpose, it appears equitable that the annuity should be apportioned between the two sources of income. The annuities of $2,500.00 were to be paid entirely out of Liberty bond interest. Interest was received as follows:

4¼% Liberty Bond interest		21,650.35
From the above the following annuities are first paid:		
W. W. Hartley	1,200.00	
Mary Rogers	1,200.00	
Wm. Smith	100.00	2,500.00
Balance		19,150.35
Northern Pacific Bond interest		3,000.00
Available to pay $15,000.00 annuity.		22,150.35

59 $3,000.00 is 13.544% of $22,150.35

Therefore 13.544% of the $15,000.00 was paid out of Northern Pacific interest ($2,031.60) and the balance of $968.40 should be included as taxable income.

Reconciliation:

Ordinary interest received Notes, etc.	$758.31
Excess N. P. interest not used for annuities	968.40
Correct interest as above	1,726.71

Item 4, Rents and Royalties:	Reported on return	53,827.97
	Corrected	42,062.95
	Difference	11,765.02

The difference of $11,765.02 consists of the following items:

Additional depreciation on rental Bldgs. as per Exhibit F	1,478.90
Additional depletion as per Exhibit I	10,286.12
Total as above	11,765.02

The corrected net income from rents and royalties was computed as follows:

Items	Amount Received	Depreciation & Depletion	Expenses	Net Income
Rentals	27,364.62	5,530.28	6,400.13	15,434.21
Royalties	66,050.52	39,421.78		26,628.74
Totals	93,415.14	44,952.06	6,400.13	42,062.95

Depreciation and depletion are allowed on same basis as to the decedent, instead of on appraised values.

Item 6, Profit from Sales:		
	Reported on Return	4,628.37
	Corrected Exhibit J	4,551.72
	Difference	76.65

The difference of $76.65 as shown above was due to a change of basis, from the appraised value as used in the return to cost or March 1, 1913 value to decedent.

60 Item 6, Profit from Sales continued
Reg. 69 Art. 343.

Item 8, Liberty Bond Interest:		
	Reported on return	$20,375.35
	Corrected	4,906.95
	Difference	15,468.40

The corrected taxable interest from Liberty Bonds was computed as follows:

Balance Liberty Bond Interest available for payment of annuity of $15,000.00 (See item 3 above)	$19,150.35
$86.456 of $15,000.00 paid out of above item	12,968.40
Balance of Liberty Bond Interest	6,181.95

Exemption Interest on $ 5,000.00	212.50	
" " on $50,000.00 July 2, 1926	1,062.50	1,275.00
Balance taxable		4,906.95
Item 9, Other Income:		
Reported on return		2,890.60
Corrected		2,903.72
Difference		12.12

The difference of $13.12 consists of an error in reporting the profit from the Wisdom Lot contract as follows:

Wisdom lot contract:		
Total receipts	4,029.03	
¾ of profit paid to owners	2,634.17	
Balance taxable to estate	1,394.86	
Profit reported on return	1,381.74	
Difference	13.12	
61 Item 11, Interest paid:		
Reported on return		7,621.75
Corrected		7,621.75
Difference		None
Item 12, Taxes paid:		
Reported on return		57,659.81
Corrected		57,659.81
Difference		None

The above item includes State of Minnesota royalty taxes paid during the year in the amount of $28,535.10. The balance is real estate and miscellaneous taxes.

Item 16, Other Deductions:

Reported on return	37,473.12
Corrected	18,354.37
Difference	19,118.75

The difference of $19,118.75 was computed as follows:

Items	Claimed on return	Allowed	Difference
Expenses	19,973.12	18,354.37	1,618.75
Annuities	17,500.00	—	(17,500.00)
Totals	37,473.12	18,354.37	19,118.75

Expenses were computed as follows:

Total expenses per books	39,946.23	
Less proportion of expenses applicable to heirs	8,004.38	31,941.85
Less Administration Expenses		13,587.48
Amount allowed		18,354.37

Allowable expenses consist of the following items:

Salary to H. H. Hartley Mgr. Island Farm	9,150.00
Accountants fees for Current and Estate	1,200.00
½ of office salaries	8,004.37
Total	18,354.37

Annuities are eliminated as these were paid out of Liberty Bond interest and Northern Pacific Bond interest as explained in items 3 and 8 above.

Administration expenses consisting of attorney fees and accountants fees are disallowed as these items pertain to the administration of the estate and are not allowable deductions. Art. 292, Reg. 69.

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62 Treasury Department
Internal Revenue Service
Form 886P—Jan., 1927

Name of Taxpayer Estate of G. G. Hartley

Schedule No. 6 ~~Year~~ Period } ended 12/31/1926

Computation of Tax—1924 and Subsequent Years
Income Tax

~~Net income~~ (~~from Schedule~~ Loss)		$(37,293.87)
Less: Net loss (section 206)	$	
Capital net gain		
Income subject to surtax		$
Less: Dividends	$	
Interest on Liberty Bonds, etc	4,906.95	
Personal exemption and credit for dependents	1,500.00	6,406.95
Balances subject to normal tax		$ None
Normal tax at ....on $	$	
Normal tax at ....on $		
Normal tax at ....on $		
Surtax on ....$		
Tax at 12½% on capital net gain of $		$
Fiscal year income from partnerships, etc.:		
Normal tax at ....on $	$	
Normal tax at ....on $		
Normal tax at ....on $		
Surtax on ....$		
Total tax		$ None

Less: Credit of 25% for earned net income (from Schedule..)	$.....
Income tax paid at source	.....
Taxes paid to a foreign country	.....
Total tax assessable	$ None
Tax previously assessed	None
Additional tax to be assessed (over assessment)	$ None

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Exhibit A

Depreciation Summary—Farm Buildings and Equipment

Description			Reserve to 12/31/23	Depreciation allowed 1924	1925	1926
Frame Buildings—						
Island Farm	Exhibit	B	18,001.37	2,155.53	2,155.55	2,155.53
Farm Machinery—						
Island Farm	"	C	37,008.41	1,715.15	—	—
Frame Building—						
Allendale Farm,	"	D	4,814.22	492.79	492.79	492.79
Stone Building—						
Allendale Farm	"	E	498.99	51.33	51.33	51.33
Totals			60,322.99	4,414.80	2699.65	2699.65
Debit to Reserve for disposition of Bldg.				325.00		
Debits to Reserve for Exhaustion of Mach.				38,723.56		
Amended Reserve			60,322.99	25,689.23	28,388.88	31,088.53
Total Depreciation allowed as amended				4,444.80	2,699.65	2,699.65
Total Depreciation claimed				1,330.00	5,697.36	5,885.50
Net Increase (Decrease)				3,114.80	(2,997.71)	(3,185.85)

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Exhibit B

Depreciation Farm Buildings and Equipment

Year	Corrected Balance close of period	Additions (Reductions)	Corrected Reserve	Depreciation 1924	1925	1926
(Frame Buildings—Island Farm Rate 3% Acq prior 3/1/13)						
12/31/23	71,850.85	None	18,001.37	2,155.53	2,155.53	2,155.53

Exhibit C

(Farm Machinery—Island Farm Rate 10% Acq. prior 3/1/13)

12/31/23	38,723.56	None	37,008.41	1,715.15	
1924		a (38,723.56)			

Exhibit D

(Frame Farm Buildings, Allendale Farm, Rate 3%. Acquired prior 3/1/13)

12/31/23	17,426.23	4,814.22			
1924	16,426.23	b(1,000.00)	492.79	492.79	492.79

Exhibit E

(Stone Buildings, Allendale Farm, Acquired Prior 3/1/13 Rate 2%)

12/31/23	2,566.27	498.99	51.33	51.33	51.33

(a) Farm machinery fully depreciated
(b) Farm building wrecked

65 Exhibit F

Depreciation Summary—Rental Property

Description	Reserve to 12/31/23	1924	1925	1926
No. 1, Exhibit G	4,875.00	450.00	450.00	450.00
No. 2, Exhibit G	2,600.00	240.00	240.00	240.00
No. 3, Exhibit G	2,708.33	250.00	250.00	250.00
No. 4, Exhibit G	6,500.00	600.00	600.00	600.00
No. 5, Exhibit G	2,708.33	250.00	250.00	250.00
No. 6, Exhibit G	4,080.50	—	—	—
No. 7, Exhibit G	12,499.67	1,177.49	1,177.49	1,177.49
No. 8, Exhibit H	5,043.50	483.99	483.99	483.99
No. 9, Exhibit H	5,025.98	717.80	717.80	717.80
No. 10, Exhibit H	10,612.36	1,361.00	1,361.00	1,361.00
Totals	56,653.67	5,530.28	5,530.28	5,530.28
Debit to Reserve for sale of assets		4,080.50		
Amended Reserve	56,653.67	58,103.45	63,633.73	69,164.01
Total Depreciation allowed as amended		5,530.28	5,530.28	5,530.28
Total Depreciation claimed		3,717.26	3,717.26	4,051.38
Net Increase (Decrease)		1,813.02	1,813.02	1,478.90

Estate of [illegible] G. Hartley

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EXHIBIT A

DEPRECIATION Rental Property

Year and Month	Corrected Balance close of period	Additions (Reductions)	12/31/23 Corrected Reserve	1924	1925	1926
No. 1, Lot 7.8, B 11 Bell Add Rate 5%) Acq. 3/1/13 prior)						
12/31/23	9,000.00	None	4,875.00	450.00	450.00	450.00 -
No. 2, Lots 1, 2, 3, B. 7, Bell Add. Rate 3% (Ac. 3/1/13 Prior)						
12/31/23	8,000.00	None	2,600.00	240.00	240.00	240.00 -
No. 3, Blk. 11, 3d Add. Rate 5%) (Acq. 3/1/13Prior)						
12/31/23	5,000.00	None	2,708.33	250.00	250.00	250.00 -
No. 4, Blk 2 Central Add. Rate 6 2/3 (Acq. 3/1/13 Prior)						
12/31/23	7,500.00	None	6,500.00	600.00	600.00	600.00
No. 5, Blot 19, 21, E. Superior St. Rate 5%) Acq. 3/1/13 Prior)						
12/31/23	65,000.00	None	8,708.33	250.00	250.00	250.00
No. 6, Lots 41, 43, 45 E. Superior Acq. 3/1/13 Prior)						
12/31/23	7,469.08		4,080.50			
1924	- a	(7,469.08				
No. 7, Lots 29, 31. Rate 6 2/3 (Acq. 1918)						
12/31/23	18,115.18	None	12,499.67	1177.49	1177.49	1177.49

(a) Sale in 1924

Amt 3969.49
Exhibit A — 3567.99
Exhibit A — 2199.15

EXHIBIT E

DEPRECIATION - Rental Property

Year	Corrected Balance close of period	Additions after 12/31/23 (Deductions)	Corrected Reserve	Depreciation 1924	1925	1926
No. 8, Pillsbury Add. Rate 3%) Acq. 3/13 Prior)						
12/31/23	16,132.89	None	5,083.50	483.99	483.99	483.99
No. 9, Lots 6, 7, 8, Blk. 11, Rate 3%) Acq. 1917)						
12/31/23	23,926.52		5,025.98	717.80	717.80	717.80
No. 10, Portland Div. Office Bldg. Rate 2%)(Acq. 1915-16)						
12/31/23	68,050.00	None	10,612.36	1361.00	1361.00	1361.00

EXHIBIT I

COMPUTATION OF DEPLETION 1924-1925-1926

Mine	1924 Tons sold	Royalty Received	Unit Rate Depletion	Depletion allowed
Brown No. 1	256,487	12,824.35	3.1052¢	7,964.43
Brown No. 2	134,522	6,726.11	3.1052¢	4,177.20
Snyder	710,591	62,176.77	5.4342¢	38,614.94
McEwen	40,000	6,000.00	7.5905¢	3,036.20
Fletcher	30,000	1,312.52	1.8942¢	568.26
Semmens	80,000	10,000.00	7.7631¢	6,210.48
Judd	174,298	19,244.77	6.8574¢	11,951.90
Billings	100,000	9,375.00	3.5994	3,599.00
Totals		127,659.53		76,122.41
Depletion claimed				41,663.62
Difference				34,458.79
	1925			
Brown No. 1	389,042	19,482.13	3.1052¢	12,099.16
Brown No. 2	130,246	6,512.33	3.1052¢	4,044.40
Snyder	1,191,524	104,258.42	5.4342¢	64,769.80
McEwen	40,000	6,000.00	7.5905¢	3,036.20
Fletcher	30,000	1,312.52	1.8942¢	568.26
Semmens	55,088	6,886.11	7.7631¢	4,276.54
Judd	100,180	11,061.50	6.8574¢	6,869.74
Billings	100,000	9,375.00	3.5994	3,599.00
Totals		164,888.01		99,243.10
Depletion claimed				67,272.81
Difference				31,970.29

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Exhibit I

Computation of Depletion—1926

	1926 Tons sold	Royalty Received	Unit Rate depletion	Depletion allowed
Brown No. 1	42,595.00	2,129.78	3.1052¢.	1,322.66
Brown No. 2	72,719.	3,635.97	3.1052¢.	2,258.07
Snyder	482,510.	42,219.66	5.4342¢.	26,220.56
McEwen	40,000.	6,000.00	7.5905¢.	3,036.20
Fletcher	30,000	1,312.52	1.8942¢.	568.26
Hemmens	30,000	3,750.00	7.7631¢.	2,328.93
Judd	20,966	2,315.09	6.8574¢.	1,437.72
Billings	62,500	4,687.50	3.599¢.	2,249.38
Totals		66,050.52		39,421.78
Depletion claimed				29,135.66
Difference				10,286.12

EXHIBIT J

COMPUTATION OF PROFIT OR LOSS ON SALES OF REAL ESTATE 1924

		Year Acq.	Sale price	Cost or 3/1/13 value	Profit or (loss)	%	Collections	Taxable Income	1925 Collections	Taxable Income	1926 Collections	Taxable Income
Lots 1 to 8, incl. 10-11 B 9 and Lots 5 to 23 Inc. B 4 Woodland Park	Prior 3/1/13	9	5,130.00	1,879.00	3,251.00		5,130.00	3,251.00				
Kinney Lots 6 Blk 7		Prior 3/1/13	70.91	123.00	(52.09)		70.91	(52.09)				
Lot 4, B. 11, Woodland Park		Prior 3/1/13	371.59	97.00	274.59		371.59	274.59				
Lots 15 - 16 Woodland Park		Prior 3/1/13	1,200.00	1,026.10	173.90		1,200.00	173.90				
Lot 14 B 2 Woodland Park		Prior 3/1/13	1,355.00	1,056.70	298.30	19.06%	300.00	57.18	1,055.00	201.12		
Lots 41, 43, 45 Enl Proper 1st Add		Prior 3/1/13	120,000.00	120, 324.46	(324.46)		120,000.00	(324.46)				
Timber permits		-	921.77	-	921.77		921.77	921.77				
R. O. Timbers Lease		-	55.00	-	55.00		55.00	55.00				
Grand Rapids Lots		Prior 3/1/13	195.00	80.00	115.00	74.2%	52.00	38.58	109.00	76.42		
" " "		" "	75.00	20.00	55.00	73.3%	[illegible].00	20.52				
40 acres 15-58-21 (Cost $2.05 per acre)		1921	600.00	82.00	518.00	86.3%	100.00	86.30	100.00	86.30	100.00	86.30
26 5 B 2 W. P. 2nd		Prior 3/1/13	525.00	90.00	435.00	82.86%	-	-	60.00	49.72	90.00	41.43
Lot 1, B 2 W. P. 2nd		" "	308.00	79.00	229.00		-	-	132.73	53.73		
Lot 2, B. 3 W. P. 2nd		" "	308.00	96.00	212.00		-	-	96.00	-	42.00	42.00
Keeney Lots 25 Blk 10		" "	41.67	45.45	(3.78)				41.67	(3.78)		
Grand Rapids Lots 1, 2 & 56		" "	55.00	12.50	42.50	77.3%	-	-	13.25	10.24		
Lot 7, Blk 48 Enalon		" "	630.00	540.00	90.00	14.3%	-	-	80.00	11.44	190.00	27.17
Lot 1, 2, & 26, Page E. Dak.		" "	425.00	52.00	373.00	88.1%	-	-	50.00	44.05		
Lot 2, 31 - 52 - 17		" "	350.00	154.00	196.00	44.6%			75.00	33.85	75.00	33.85
Lot 8, B. 14, W. D. Lot		" "	330.00	302.66	47.34	13.5%			70.00	9.45	59.22	8.00
Timber Permits		-	589.02	-	589.02				589.02	589.02		
Lots 5-10 1st Page. E. Dak.		Prior 3/1/13	300.00	52.00	248.00	82.6					40.00	33.04
Lots 9-10 B. 11 Portland		" "	7,333.33	3,600.00	3,733.33						7,333.33	3733.33
Timber Permits		-	291.66	-	291.66						291.66	291.66
Scrap Iron		-	75.00	-	75.00						75.00	75.00
Hay			35.50	-	35.50						35.50	35.50
Wood			5.00		5.00						5.00	5.00
Miscellaneous			139.84	-	139.84						139.84	139.84
"		-	195.00	100.00	95.00		195.00	95.00				
Net taxable income								4,599.29		1,161.16		4,551.72

Note: Where 3/1/1913 value is used this value is based on the true and full assessed values as of that date in all cases where such value was greater than cost.

* Reported on deferred payment basis.

1-C C

70 Exhibit K

Computation of 3/1/1913 value of
Duluth Hotel Lots

Property sold 1924 consisted of

Lots 41, 43 and 45 E. Superior Street, Duluth Proper 1st Addition. (These lots include lots 10 to 16, inclusive, Block 6, Portland Division)

1913 True and full assessed value of above	$112,500.00
1913 " " " " " " Bldgs.	3,308.00
	115,808.00
Comparison of actual sales in 1913 in adjoining block shows that sale price in 1913 was 3.943% greater than true and full assessed value. Allowing 3.943% increase in true and full value (3.943% of 115,808.00) equals	4,566 31
Total 3/1/1913 value	120,374.31
Add—Subsequent improvements	4,030.65
Total 3/1/13 value and cost	124,404.96
Less—Depreciation sustained	4,080.50
Depreciated value date of sale 1924	120,324.46

Note: Original cost of above property in 1906-1907 was $63,943.72 and was sold in 1924 for $120,000.00.

71 Petitioner's Exhibit 2.

Partial Decree of Distribution

In Probate Court

State of Minnesota,
County of St. Louis

In the Matter of the Estate of Guilford G. Hartley, Decedent.

The petition for partial decree assigning the portion of property in the above entitled estate and for an order or decree confirming the setting aside of Liberty Bonds or other securities to provide for the annuities provided for in the will came on for hearing before the above named court on the 7th day of April, 1924, Messrs. Fryberger, Fulton, Hoshour & Ziesmer appearing as attorneys on behalf of said pe-

tition, there being no appearance in opposition thereto, the court after duly considering the petition and the files and records in said matter, and being duly advised in the premises finds the following facts:

First. That notice of said hearing has been duly given and served as required by law and the citations of the court for said hearing made and filed on the 8th day of April, 1924, and that said citation has been published as required by law in the Duluth News Tribune.

Second. That the said estate has been partially administered, as set forth in said petition, and the expenses of the administration to the date of said petition and the expenses of the last sickness and burial of said decedent and all of the debts of said decedent and claims against the estate
72 have been fully paid and satisfied, and the said representatives have filed a partial account herein of all matters up to January 1, 1924, which partial account has been settled on the 7th day of April, 1924.

Third. That the said decedent died testate on the 17th day of January, 1922, and at the time of his death was a resident of Duluth, in the County of St. Louis, State of Minnesota.

Fourth. That the portion of said estate of said decedent ready for distribution, as shown by said petition and at said hearing, is:

Stock in banks and other corporations, of the value of ....$ 573,160.55

Mortgages, bonds and other similar securities of the value of 1,143,186.63

Other personal property of the value of 16,310.69

Real Estate consisting of the Southeast quarter of the Northeast quarter of Section 21, Township 56, Range 24, Itasca County, Minnesota.

Fifth. That in addition to the special bequests of personal property provided for in said will and paid as appears from said petition for the allowance of the partial account, it is provided in said will and the codicils thereto attached that the said executors and trustees keep intact the following securities:

$13,000. 4¼% Second Liberty Loan

$23,700. 4¼% Third Liberty Loan

$34,200. 4¼% Fourth Liberty Loan

$83,100. 4¾% Victory Loan

for the payment of the following annuities: To pay to Wilder W. Hartley and Benjamin F. Hartley, brothers of the deceased, and to Mary Rogers, sister of the deceased,
73 the sum of one hundred dollars per month during the term of their lives; and to Mrs. Delia Woodward the sum of fifty dollars per month for the term of her life; and a further annuity of one hundred dollars per year to William Smith during his life, and upon the death of said beneficiaries said fund to be divided among the children of said deceased in the same manner as the rest of the estate (the issue of parents to take the parent's share).

That it is further provided in and by the terms of said will that as said persons receiving said annuities die, enough of said bonds to pay the remaining annuities should be held and the balance turned in to the general estate of the deceased for division, and it appearing that said Delia Woodward predeceased said testator, and it further appearing that Benjamin F. Hartley, another of said annuitants, has died since the decease of said testator, and it further appearing to the court that fifty-eight thousand eight hundred fifty dollars par value of said bonds will furnish sufficient income to pay the remaining annuities and that the balance of said bonds shall be turned back into the general estate of the deceased for division;

Now Therefore, the action of said executors and trustees in holding intact said bonds of the par value of fifty-eight thousand eight hundred fifty dollars, as provided for in said will and the codicils thereto, and as found by the court herein to be sufficient to pay the remainder of said annuities, be and the same is hereby in all things confirmed, and adjudged and decreed to be in accordance with the terms of said will, and said executors and trustees under said will are ordered, adjudged and decreed to reinvest said bonds when the same become due in other bonds of the United States of America.

74 That it is further provided in and by the terms of said will and the codicils thereto attached that said executors shall set aside a fund sufficient to assure an income of fifteen thousand dollars per year to Carrie E. Hartley, the wife of said deceased, and the income from which shall be paid semi-annually to said Carrie E. Hartley for the maintenance of her home and household, and of which she need

give no account, and it is further adjudged and decreed that the setting aside of said fund in the form of

$286,750.00 4¼% Fourth Liberty Loan Bonds
56,500.00 Northern Pacific Fours
18,500.00 Northern Pacific Threes

as heretofore carried out by said executors, is in accordance with the terms of said will, and it is in all things confirmed, and the payment of said income from said property to said Carrie E. Hartley by said executors for the maintenance of said widow is hereby confirmed and adjudged and decreed to be in accordance with the terms of said will.

That it is further provided by the terms of said will and the codicils thereto attached that said Carrie E. Hartley, wife of said deceased, shall have the homestead during the term of her life, and it is hereby ordered, adjudged and decreed that the homestead of the deceased, situated in the County of St. Louis and State of Minnesota, and described as follows, to-wit:

Lots 1, 2, 3, and 4, in Block 12, and Lots 1, 2, 3 and 4, in Block 14, Banning & Ray's Sub-Division of Duluth,

be adjudged and decreed in Carrie E. Hartley, wife of said deceased, during the term of her natural life, with remainder over to Cavour Hartley, Jessie H. Congdon, Irma H. Claypool, Judith H. Lewis and Guilford Hartley.

The court further finds that it is further provided in
75 and by the terms of said will that the residue and remainder of said estate after the bequests of the furniture, horses, vehicles and the personal property used in connection with the home and office furniture, wearing apparel and jewelry, shall be decreed to the surviving wife, Carrie E. Hartley, and children, Cavour Hartley, Jessie H. Congdon, Irma H. Claypool and Judith H. Lewis, and to the remaining minor child, Guilford Hartley, as soon as he becomes the age of twenty-one years, and to their successors, upon the trusts specified in said will and codicils thereto, to-wit: To pay one-sixth of said entire residue and remainder to Carrie E. Hartley, surviving widow of said deceased, and pursuant to said provision of said will, it is ordered, adjudged and decreed that title to one-sixth of said property set forth in Exhibit A, hereto attached, be and the same is vested in said Carrie E. Hartley, and that an additional amount equal to one-fifth of all property set aside to pay annuities and for specific legacies and bequests, to-wit:

$69,120.00 4¼ Fourth Liberty Loan Bonds
11,500.00 Northern Pacific Fours
3,500.00 Northern Pacific Threes

be adjudged and decreed to be in said Carrie E. Hartley in fee simple, free from said trust.

The court further finds that as provided by said will that the remaining estate, after said special bequests and legacies and said annuities and said bequest to said surviving widow, Carrie E. Hartley, is devised and bequeathed to said Cavour Hartley, Jessie H. Congdon, Irma H. Claypool and Judith H. Lewis, in trust to pay over so much of the annual income to each of said children as may be necessary for the sup-
76 port and education of said children until they reach the age of twenty-one years, and to pay over the entire net annual income to each of said children until they reach the age of twenty-five years, and at the age of twenty-five years to pay over one-half of each child's share to it absolutely, and on reaching the age of thirty years, to turn over the remaining half to each of said children respectively, and as finally divided and disposed of that the trust created shall be terminated and fulfilled as to said property, and for the purpose of said payments and said division and distribution that said remaining estate should be divided into as many shares as said deceased had children, with an additional one-half share to said son Cavour Hartley, and making five and one-half shares.

The court further finds that all of said children are past thirty years of age except Guilford Hartley, who is a minor;

Now, pursuant to said provision of said will, it is ordered, adjudged and decreed that the title to an undivided two-elevenths of said remaining personal estate is vested in each of the following of said children, to-wit: Jessie H. Congdon, Irma H. Claypool and Judith H. Lewis; that an undivided three-elevenths of said estate is vested in Cavour Hartley, all of said shares to be in fee simple, and free from said trusts, and that the remaining two-elevenths is vested in said trustees, in trust to pay over such portion of the income thereof as may be necessary for the support and education of said Guilford Hartley until he shall attain the age of twenty-one years, at which time the entire net annual income shall be paid to him until he reaches the age of twenty-five years, at which time an undivided one-half thereof shall be

vested in him absolutely until he shall reach the age
77 of thirty years, at which time said remaining half of said distributive share shall be vested in him and said trust thereupon terminated as to said property.

That the real estate of said deceased ready for distribution consists of the following described property situate in the County of Itasca, State of Minnesota, to-wit: Southeast Quarter of the Northeast Quarter (SE¼ of NE¼), Section Twenty-one (21), Township fifty-six (56), Range twenty-four (24) West, and that the following named persons are the persons entitled to said real estate under the terms of said will, to-wit: Carrie E. Hartley, Cavour Hartley, Jessie H. Congdon, Irma H. Claypool, Judith H. Lewis and Guilford Hartley.

Now, Therefore, On motion of the attorneys for the representative of said estate, and by virtue of the power and authority vested in this court by law, It Is Hereby Ordered, Adjudged And Decreed, and the said court does hereby Order, Adjudge And Decree, that all and singular the above described real property be, and the same hereby is, assigned to and vested in the above named persons in the following proportions and estates, to-wit:

Carrie E. Hartley,.....an undivided 1/6 thereof
Cavour Hartley, ...an undivided 15/66 thereof
Jessie H. Congdon,.....an undivided 10/66 thereof
Irma H. Claypool,.....an undivided 10/66 thereof
Judith H. Lewis,.....an undivided 10/66 thereof

And the remaining undivided 10/66 thereof be, and the same hereby is, assigned to and vested in said trustees in trust to pay over such portion of the income thereof as may be necessary for the support and education of said Guilford Hartley until he shall attain the age of twenty-one years, at which time the entire net annual income shall be paid to him until he reaches the age of twenty-five years, at which time an undivided one-half thereof shall be vested in him
78 absolutely until he shall reach the age of thirty years, at which time said remaining half of said interest shall be vested in him absolutely and said trust thereupon shall be terminated as to said property.

To Have And To Hold The Same, together with all the hereditaments and appurtenances thereunto belonging or in any wise appertaining, to the said above named persons, their heirs and assigns; without prejudice, however, to any lawful

conveyance of said property or any part thereof by said persons made.

Witness, The Honorable S. W. Gilpin, Judge of said court, and the seal of said court, this 24th day of February, 1925.

S. W. GILPIN,
Judge of Probate.

Seal
Probate Court
St. Louis County, Minn.

EXHIBIT A
G. G. Hartley Estate

Residue of Stock in banks and other corporations
December 31, 1925.

		Shares	Amount
Algoma Mining Company		20	450.00
American Investment Corporation		175	7151.25
Duluth Iron & Steel Co. full paid		698	61240.00
[illegible] Company		5	1200.00
First National Bank, Ampbell		60	8851.80
First National Bank, Calcraine		45	15820.00
~~First National Bank, Elgin~~		~~--~~	~~--~~
Central West Bank, Duluth		10	1570.00
City National Bank, Duluth		10	2017.50
First National Bank, Nashwauk		15	5698.25
Canisteo Mining Company		96	2162.00
Cass Water Light & Power Co.		5	4250.00
Cass Land Co.		4	
Calumet & Hecla Copp Consolidated Copper Co.		316.6	5350.00
Duluth-Superior Traction Co.	Cm.	81	612.00
	Pd.	88	550.00
Diamond Iron Company		2	650.00
Greenwood Company	Cm.	170	.....
	Pfd.	186	.....
Grand Rapids Exploration Co.		270	10750.50
Great Northern Railway Co.		888	28478.70
Hanna Mining Company		2	....
Iceland Copper Co.		855	....
Jellison Farm Creamery Co.		79	....
[illegible] Mining Co.		2673	26517.50
Judson Land Co.		2501	12500.00
Minnesota National Bank		100	12500.00
(2) American Fruit Growers Association	units	556	22157.50

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[illegible]		1/8th interest	.....	
[illegible] Copper Co. ($20 paid in)			24884	12187.50
Lone Iron Co.			1282½	600.00
Marshall Wells Co.		Cm Pfd.	525 500	53686.00 50000.00
Mirimichi Co.			650	....
Matapedia Co.			21 1/4	---
Meenbe Improvement Co.			1	....
Minneapolis, St.Paul & S.S.M.Ry.			528	52862.50
Graham Iron Co.			75	....
Nevada Mining Co.			12621/2	15625.00
Nevada Land Co.			6318½	44968.75
News Tribune Co.			20	1850.00
Nachusa Co.			2	50.00
Northern Drug Co.		Cm Pfd.	50 50	5000.00 ....
Northern Pacific Railway Co.			528	40855.70
Northern Packing Company	50 Pfd. 100 Cm.		150	2100.00
Onondaga Iron Co.			250	20250.00
Park State Bank			20	1500.00
Park Point Land Co.			90.16	13822.50
Potato Growers Association of Parker Co.		Cm Pfd.	232 250	23200.00 21875.00
Reien Exploration Co.			4	1754.00
Seneca Copper Co.			180	3600.00
St.Mary's Parish Land Co.			30	2461.56
Ski Hill Co.			12	161.60
The Shoguoco Co.			31	....
Two Harbors Mere. Co.			250	....
The Tobique Land Company			4	....
Zenith Furnace Co.			93	8777.34
		TOTAL		573160.56

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Chas Water Light		17500.00
D. & I. R. 1st [illegible]		12544.24
Duluth Curling Club 2nd 6%		1500.00
Itasca County Trunk [illegible]		26000.00
Itasca County [illegible]		10000.00
Jap 4's, 1925	2 500	2154.98
Jap 4's, 1925	11900	6824.09
Kitchi Gummi 1st Gold 5's	14000.00	11200.00
Kitchi Gummi 2nd Gold 5's	1000.00	600.00
Kitchi Gummi 2nd Gold 5's	500.00	300.00
Minnesota Pike Relief 4 1/2's	50000.00	[illegible]
Russian Republic Notes, [illegible]	65000.00	. . ....
Russian Republic Notes, [illegible]	5000.00	. . . . .
Russian Three Year [illegible]	12000.00	1800.00
St. Paul Union [illegible] Mortgage, [illegible]	10000.00	9450.00
St. Louis Co. Bonds 5's	[illegible]	26840.53
1st Liberty 3 1/2's	[illegible]	1194.32
1st Liberty [illegible]	[illegible]	28000.00
1st 2nd 4 [illegible]	[illegible]	[illegible]
2nd [illegible]	[illegible]	[illegible]
3d 4 1/4's	[illegible]	[illegible]

[redacted]

(Continued)

		Par	
4th 4 1/4's	Registered Coupon	100000.00) 58000.00)	155046.09
4th 4 1/4's	Registered Coupon	50000.00) 115000.00)	162926.71
4th 4 1/4's	Registered	20000.00	19536.00
4th 4 1/4's	Coupon	155500.00	155349.21
Plus interest accrued at time of purchase			281.62
U.S.Treasury 4 1/4% Notes of 1926		80000.00	80112.00
U.S.Treasury 4 1/2's		40000.00	40155.00
Plus interest accrued at time of purchase			300.00
U.S.Treasury 4 1/4% notes due 10/15/52		5000.00	5000.00
U.S. 4 1/8% Treas ry Notes		10000.00	10000.00
Plus interest accrued at time of purchase			243.43
Interest accrued on 4% Treasury Notes at time of purchase, notes since sold			1481.37
			$926363.80

~~Of the above on this sheet~~

~~DO SOS DISBURSES 150,000 par 4th 4 1/4's registered~~
~~DO SOS DISBURSES 205,500 par 4th 4 1/4's coupon~~

S. S. Hartley Estate
Residue of Book Accounts
At End of September 31, 1925.

Due Estate

The Gregory Company		10604.35
Judith Lewis		400.00
Estate paid taxes for purchasers of Home Acres Farms		526.88
Leon R. Inn	54.25	57.25
Guilford Hartley		1158.72
Wm. A. Greer		300.00
Leon Iron Co.		.82
Cass Land Company		14016.60
Forest Reserve Scrip		100.00
Hartley Stock Farm		2312.24
Beelye		1686.21
Fred R. Green		22499.15
Park Point Land Co.		5287.10
Reien Exploration Co.		1500.95
Mrs. L. C. Rogers		68.05
Tobique Land Co.		32945.02
J. B. Benson, taxes on Page lots sold to him		6.05
		93449.38

Liability

Millie Bunnell	8.50	
Cornwall Investment Co.	134.00	
Carrie E. Hartley	344.45	
Onondaga Iron Co.	13433.20	
This company to be charged with $22157.55, for American Fruit Growers Assn. Stock turned over to them.		
Edmund Iron Co.	1050.00	
Wisdom Lot Account	4609.09	19579.24
		73870.14

Items in suspense 649.76

$73220.38

G. K. Hartley Estate

Notes Receivable

At the close of the day

December 31, 1923.

	Principal	Interest
A. D. Passard et al	2000.00	73.32
D. M. Gunn	4000.00	
Wm. Mason	1500.00	
John Valin	57.18	
D. A. Gunn	5000.00	
Ned A. Merriam	310.00	
Andrew Kemicki	777.61	
Ralph Nelson	1873.47	145.20
Waldon V. Anderson	592.44	89.27
E. B. Swanson	277.00	
Ernest R. Lade	2000.00	
Northland Country Club	75000.00	
Ernest Svend Von Mehren	153.58	
Paul Von Mehren	655.37	
Jordan Nelson	1000.00	
James A. Ferguson	6950.00	
Two Harbors Mercantile Co.	10826.15	
Island Farm Creamery Co.	11816.85	
	[illegible].45	149.45
Grand total		[illegible].22

Filed February 24, 1925, and recorded in Book 10 of Final Decree Record on page 112.
Delia Chevrette
Deputy Clerk of Probate.

85 No. 29904

In Probate Court.

State of Minnesota,
County of St. Louis—ss.

I, Sheldon Watts, Clerk of the Probate Court within and for said County of St. Louis, do hereby certify that I have compared the foregoing copy of the record of the Partial Decree of Distribution, in the matter of the estate of Guilford G. Hartley, decedent, with the original records thereof now remaining in this office and have found the same to be correct transcript therefrom and of the whole of such original records. And I further certify that said exemplification would be received in evidence in all the courts of the State of Minnesota.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Duluth, this 3rd day of January, A. D. 1934.

SHELDON WATTS,
Clerk of Probate Court.

Seal
Probate Court
St. Louis County, Minn.

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86 (Praecipe for Transcript on Appeal of Cavour Hartley, Executor, etc.)

Filed January 12, 1934, United States Board of Tax Appeals.

To the Clerk of the United States Board of Tax Appeals:

You are hereby requested to prepare and certify and transmit to the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, with reference to the petition for review heretofore filed by the petitioner in the above cause, a transcript of the record in the above cause, prepared and transmitted as required by law and by the rules of said Court, and to include in said transcript of record the following documents or certified copies thereof:

1. The docket entries of proceedings before the United States Board of Tax Appeals in the above entitled cause.
2. Pleadings before the Board.
   (a) Petition, including annexed copy of deficiency letter and attached statements.
   (b) Answer.

3. Findings of fact, opinion and decision of the Board.

4. Petition for review by Cavour Hartley, Executor together with proof of service of notice of filing petition for review and of service of a copy of petition for review.

5. Statement of the evidence, including petitioner's (Exhibits 1 and 2). As Settled and Allowed.

6. Orders enlarging time for the preparation of the evidence and for the transmission and delivery of the record.

7. This praecipe.

H. C. FULTON,
H. B. FRYBERGER,
EDWARD L. BOYLE,
WILLIAM B. FRYBERGER,
Attorneys for Petitioners.

Service of a copy of the within praecipe is hereby admitted this 22nd day of November, 1933.

E. BARRETT PRETTYMAN,
General Counsel, Bureau of Internal Revenue, Attorney for Respondent.

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87 (Clerk's Certificate to Proceedings on Appeal of Cavour Hartley, Executor, etc.)

United States Board of Tax Appeals
Washington

Cavour Hartley, Executor, Estate of G. G. Hartley, Petitioner,
Docket No. 42343 vs.
Commissioner of Internal Revenue, Respondent.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 86, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal as above numbered and entitled.

Seal
U. S. Board of
Tax Appeals
1924.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 25th day of January, 1934.

B. D. GAMBLE,
Clerk, United States Board of Tax Appeals.

No 9946. Filed Feb. 12, 1934, E. E. Koch, Clerk.

* * * * * *

26 (Petition of Commissioner of Internal Revenue for Review of Decision of United States Board of Tax Appeals.)

Filed August 29, 1933, United States Board of Tax Appeals.

In the United States Circuit Court of Appeals for the Eighth Circuit

Guy T. Helvering, Commissioner of Internal Revenue Petitioner,

(B. T. A. No. 42343.) vs.

Cavour Hartley, Executor of the Estate of G. G. Hartley, Respondent.

To the Honorable Judges of the United States Circuit Court of Appeals for the Eighth Circuit:

Now comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorney, Pat Malloy, Assistant Attorney General, E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue, and Brooks Fullerton, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I.

That he is the duly appointed, qualified, and acting Commissioner of Internal Revenue, appointed and holding his office by virtue of the laws of the United States; that the respondent herein, Cavour Hartley, is the duly appointed, qualified and acting executor of the estate of G. G. Hartley, deceased, and is a resident and inhabitant of the City of Duluth in the State of Minnesota, and filed a Federal income tax return for the calendar year 1924, as such executor, with the Collector of Internal Revenue for the District of Minnesota,

whose office is located at St. Paul, Minnesota, which is
27 within the jurisdiction of the United States Circuit Court of Appeals for the Eighth Circuit.

II.

The nature of the controversy is as follows, to-wit:

The respondent is executor of the estate of G. G. Hartley, who died January 11, 1922, leaving sundry real, personal and mixed properties valued at approximately $3,000,000, producing an annual gross income of something like $200,000. Included therein were some fifteen iron mines operated under royalty leases and several thousand pieces of real estate consisting of farms and improved rental city properties. The personal property comprised a miscellaneous quantity of investment and income securities. In the conduct of his business the decedent maintained a considerable office organization which was supervised by a general office manager who employed assistants, bookkeepers, stenographers, and an engineer who had supervision over collection of royalties on the iron mines. During the years 1922 to 1928 the executor was engaged in (a) administering decedent's estate, and (b) in continuing to carry on the business previously conducted by decedent.

None of the assets of the estate were distributed until February 24, 1925, when there was a partial distribution under order of the probate court. The partial distribution included property worth approximately $2,000,000.

After assuming control of the estate, the executor maintained intact the organization built up by the decedent and continued to carry on the business in the same manner in which it had been theretofore conducted. After the distribution set out above such office organization managed and conducted the distributed properties as if they were still included in the estate.

28 In respondent's tax return for the calendar year 1924 the executor claimed certain deductions from the gross income of the estate for (1) salaries for the office manager and his staff in the sum of $23,535.13. (2) expenses, in the amount of $2,633.60, and (3) accountant's fees in the amount of $2,000.00.

In the audit of respondent's income tax return for the year 1924 the Commissioner allocated a portion of each of said three items, $7,192.57, $1,316.80 and $1,400.21, respectively, to the expense of administering the estate and the remainder of said items to the expense of carrying on the business.

The Commissioner disallowed as a deduction from gross income those portions of said three items allocated to the expense of administering the estate. Said disallowance was in accordance with Regulations 69, Article 292, O. D. 357, C. B. 2, page 175, and Estate of Given vs. Lewellyn, Collector, 38 Fed. (2d) 477.

From the deficiency notice for the calendar year 1924 respondent appealed to the Board of Tax Appeals, contending, in respect of these three items, that the whole amount of each item was an expense of carrying on business, but introduced no evidence to prove (a) that the respondent, as executor, "carried on business" as distinguished from the care of decedent's property and the collection of income therefrom, or to prove (b) what portion of said three items were incurred (1) as expenses of administration and (2) what portion as expenses of carrying on business, thus failing to sustain the burden of proof or to overcome the prima facie correctness of the Commissioner's determination. The Board of Tax Appeals, as to said three items, reversed the determina-
29 tion of the Commissioner and allowed the full amount of said items as deductions from respondent's income for 1924, and by such action reduced the tax as determined by the Commissioner for the year 1924 from $3,261.02 to $1,745.47.

The Board's finding and opinion were promulgated March 16, 1933, and the order of redetermination was entered on June 3, 1933.

III.

1. The Board erred in finding "that the respondent (petitioner on review herein) disallowed parts of the deductions on account of salaries and expenses on the theory that the rejected amounts fairly represent the ratable parts of such charges which should be allocated to the management of portions of the estate distributed to the heirs of the decedent and also that some part of such charges was for the management of the 'Hartley Family' account."

2. The Board erred in reversing the determination of the Commissioner wherein he allocated certain portions of said three disputed items to the expense of administering the estate and disallowed said portions as deductions from the income of respondent for the calendar year 1924.

3. The Board erred in failing to affirm the Commissioner's determination in disallowing said portions of said items.

4. The Board erred in failing to find that the respondent had failed to sustain the burden of proving that said allocation and disallowance by the Commissioner was incorrect.

5. The Board erred in failing to find that the respondent had failed to introduce any evidence to prove that said allocation by the Commissioner was incorrect.

30 6. The Board erred in failing to find that the respondent failed to introduce any evidence upon which the Board could allocate said three items between the expense of administering the estate and the expense of carrying on business.

7. The Board erred in respect of said three items in that the evidence does not sustain the findings.

8. The Board erred in respect of said three items in that the findings are insufficient to sustain the Board's conclusion that all of said three items of salaries, expenses and accountant's fees were expenses of carrying on a business.

9. The Board erred in failing to find that some parts of said three items were incurred in administering said estate, and that no evidence was adduced by the respondent upon which the Board could allocate such expenses between those incurred in administering said estate and those incurred in carrying on a business.

Wherefore, the Commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Eighth Circuit, that a transcript of the record be prepared in accordance with law and with the rules of said court and transmitted to the clerk of said court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said court.

(Signed) PAT MALLOY,
Assistant Attorney General.

(Signed) E. BARRETT PRETTYMAN,
General Counsel, Bureau of Internal Revenue.

Of Counsel:
Special Attorney,
Bureau of Internal Revenue.

31 United States of America,
District of Columbia—ss.

Brooks Fullerton, being duly sworn, says that he is a Special Attorney in the Office of the General Counsel of the

Bureau of Internal Revenue and as such is duly authorized to verify the foregoing petition for review; that he has read said petition and is familiar with the contents thereof; that said petition is true of his own knowledge except as to the matters therein alleged on information and belief, and as to those matters he believes it to be true.

(Sgd) BROOKS FULLERTON.

Sworn and subscribed to before me this 29 day of August, 1933.

(Sgd) GEORGE W. KREIS,
Notary Public.

My commission expires Nov. 16, 1937.

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32 (Notice of Filing of Petition for Review by Commissioner of Internal Revenue and Acknowledgment of Service.)

(Filed September 7, 1933, United States Board of Tax Appeals.)

To: H. B. Fryberger, Esq., 712-719 Lonsdale Building, Duluth, Minnesota:

You are hereby notified that the Commissioner of Internal Revenue did, on the 29th day of August, 1933, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Eighth Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 29th day of August, 1933.

(Signed) E. BARRETT PRETTYMAN,
General Counsel, Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 1 day of Sept., 1933.

.....
Respondent on Review.

H. B. FRYBERGER,
Attorney for respondent on review.

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41 (Praecipe for Transcript on Appeal by Commissioner of Internal Revenue.)

Filed January 20, 1934, United States Board of Tax Appeals.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Eighth Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board.

2. Pleadings before the Board.

(a) Petition, including annexed copy of deficiency letter and attached statements.

(b) Answer.

3. Findings of fact, opinion and decision of the Board.

4. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.

5. Statement of the evidence as settled and allowed.

6. Orders enlarging time for the preparation of the evidence and for the transmission and delivery of the record not included in transcript.

7. This praecipe.

(Signed) E. BARRETT PRETTYMAN,
General Counsel, Bureau of Internal Revenue.

Service of a copy of the within praecipe is hereby admitted this 15 day of Jan., 1933, and hereby agreed to.

FRYBERGER, FULTON & BOYLE
Attorneys for Respondent.

42 (Clerk's Certificate to Proceedings on Appeal of Commissioner of Internal Revenue.)

United States Board of Tax Appeals
Washington

Commissioner of Internal Revenue, Petitioner,
Docket No. 42343 vs.
Cavour Hartley, Executor, Estate of G. G. Hartley, Respondent.

I, B. D. Gamble, clerk of the U S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 41, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal as above numbered and entitled.

Seal
U. S. Board of
Tax Appeals
1924.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 29th day of January, 1934.

B. D. GAMBLE,
Clerk, United States Board of Tax Appeals.

No. 9943. Filed Feb. 7, 1934, E. E. Koch, Clerk.

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1 (Motion to Consolidate Cases and That One Record be Printed.)

United States Circuit Court of Appeals for the Eighth Circuit.

Cavour Hartley, Executor, Estate of G. G. Hartley, Petitioner,
No. 9946 vs.
Guy T. Helvering, Commissioner of Internal Revenue, Respondent.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner,
No. 9943 vs.
Cavour Hartley, Executor, Estate of G. G. Hartley, Respondent.

Comes now the parties hereto by their respective attorneys of record and move that the above-entitled proceedings be

consolidated for hearing and decision; that but one record shall be printed for both proceedings, and that from such consolidated record, duplications may be deleted.

FRYBERGER, FULTON & BOYLE,
Counsel for Cavour Hartley, Executor.

SEWALL KEY,
Special Assistant to Attorney General,
Counsel for Guy T. Helvering, Commissioner of Internal Revenue.

Endorsed: Motion to Consolidate Filed in U. S. Circuit Court of Appeals on Feb. 12, 1934, E. E. Koch, Clerk.

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2 (Stipulation to Consolidate and as to Printing of Record.)

United States Circuit Court of Appeals for the Eighth Circuit.

Cavour Hartley, Executor, Estate of G. G. Hartley, Petitioner.

No. 9946. vs.

Guy T. Helvering, Commissioner of Internal Revenue, Respondent.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner,

No. 9943. vs.

Cavour Hartley, Executor, Estate of G. G. Hartley, Respondent.

It is hereby stipulated between the parties hereto by their respective attorneys of record, subject to the approval of the Court:

That the above-entitled causes be consolidated for hearing and decision:

That but one record shall be printed herein on review of both the above-entitled causes, and said records shall consist of the follow[illegible]:

1. Docket entries of the proceedings before the Board.
2. Pleadings before the Board.
   (a) Petition, including annexed copy of deficiency letter and attached statements.
   (b) Answer.
3. Findings of fact, opinion and decision of the Board.

4. Petition for review by Cavour Hartley, Executor, together with proof of service of notice of filing petition for review and of service of a copy of petition for review

5. Cross petition for review by Commissioner of Internal Revenue, together with proof of service of notice of filing cross petition for review and of service of a copy of cross petition for review.

6. Statement of evidence in appeal of Hartley vs. Helvering as settled and allowed, including exhibits 1 and 2 attached thereto.

7. Orders enlarging time for the preparation of the evidence and for the transmission and delivery of the record.

8. Praecipe for record by Cavour Hartley, Executor.

9. Praecipe for record by Commissioner.

That the expense of printing said records shall be divided as follows:

The full cost of printing exhibits 1 and 2 shall be borne by Cavour Hartley, Executor, and the remainder of the cost of printing said record shall be equally divided between the parties hereto.

FRYBERGER, FULTON & BOYLE,
Counsel for Cavour Hartley, Executor.

SEWALL KEY,
Special Assistant to Attorney General,
Counsel for Guy T. Helvering, Commissioner of Internal Revenue.

(Endorsed): Filed in U. S. Circuit Court of Appeals on Feb. 12, 1934, E. E. Koch, Clerk.

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3 (Order Consolidating Cases for Hearing and Decision, and for Printing of Record.)

United States Circuit Court of Appeals, Eighth Circuit.

November Term, 1933.

Friday, February 16, 1934.

Cavour Hartley, Executor of the Estate of G. G. Hartley,
Petitioner,
No. 9946. vs.
Commissioner of Internal Revenue.

On Petition to Review Decision of United States Board of Tax Appeals.

and

Commissioner of Internal Revenue, Petitioner,
No. 9943. vs.
Cavour Hartley, Executor of the Estate of G. G. Hartley.

On Petition to Review Decision of United States Board of Tax Appeals.

Upon the joint motion and the stipulation of counsel, filed in these causes, It is ordered by this Court that these causes be, and they are hereby, consolidated for hearing and decision in this Court, that but one record shall be printed on the review of these causes to consist of the matters called for in the said stipulation, and that the expense of printing shall be divided as stipulated, the cost of printing Exhibits 1 and 2 to be borne by Cavour Hartley, Executor, etc., and the remainder of the cost of printing the record to be equally divided between the parties.

February 16, 1934.

109 And thereafter the following proceedings were had in said causes in the Circuit Court of Appeals, viz.:

(Appearance of Mr. Frank J. Wideman and Mr. Sewall Key as Counsel for Petitioner in Cause No. 9943.)

United States Circuit Court of Appeals, Eighth Circuit.

Commissioner of Internal Revenue, Petitioner,
No. 9943. vs.
Cavour Hartley, Executor, etc.

The Clerk will enter my appearance as Counsel for the Petitioner.

FRANK J. WIDEMAN,
SEWALL KEY,
Washington, D. C.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Feb. 12, 1934.

(Appearance of Mr. E. Barrett Prettyman and Mr. James K. Polk, Jr., as Counsel for Petitioner in Cause No. 9943.)

The Clerk will enter our appearances as Counsel for the Petitioner.

E. BARRETT PRETTYMAN,
General Counsel,
Bureau of Internal Revenue.

JAMES K. POLK, JR.,
Special Attorney,
Bureau of Internal Revenue.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Feb. 19, 1934.

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110 (Appearance of Counsel for Respondent in Cause No. 9943.)

The Clerk will enter my appearance as Counsel for the Respondent.

H. B. FRYBERGER,
H. C. FULTON,
EDWARD L. BOYLE,
WILLIAM B. FRYBERGER,
712 Lonsdale Bldg., Duluth, Minn.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Feb. 12, 1934.

(Appearance of Counsel for Petitioner in Cause No. 9946.)

United States Circuit Court of Appeals, Eighth Circuit.

Cavour Hartley, Executor, etc., Petitioner,
No. 9946. vs.
Commissioner of Internal Revenue.

The Clerk will enter my appearance as Counsel for the Petitioner.

H. B. FRYBERGER,
H. C. FULTON,
EDWARD L. BOYLE,
WILLIAM B. FRYBERGER,
712 Lonsdale Bldg., Duluth, Minn.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Feb. 12, 1934.

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111 (Appearance of Mr. Frank J. Wideman and Mr. Sewall Key as Counsel for Respondent in Cause No. 9946.)

The Clerk will enter my appearance as Counsel for the Respondent.

FRANK J. WIDEMAN,
SEWALL KEY,
Washington, D. C.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Feb. 12, 1934.

(Appearance of Mr. E. Barrett Prettyman and Mr. James K. Polk, Jr., as Counsel for Respondent in Cause No. 9946.)

The Clerk will enter our appearances as Counsel for the Respondent.

E. BARRETT PRETTYMAN,
General Counsel,
Bureau of Internal Revenue.

JAMES K. POLK, JR.,
Special Attorney,
Bureau of Internal Revenue.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Feb. 19, 1934.

(Appearance of Counsel for Amici Curiae in Cause No. 9946.)

The Clerk will enter my appearance as Counsel Amici Curiae.

J. M. RICHARDSON LYETH,
BEN R. CLARK,
2 Wall St., New York, N. Y.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jun. 6, 1934.

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112 (Appearance of Mr. John MacC. Hudson as Counsel for Commissioner of Internal Revenue in Causes Nos. 9946 and 9943.)

United States Circuit Court of Appeals,
For the Eighth Circuit.

Case Nos. 9946 and 9943.

Cavour Hartley, Exr.,
vs.
Commissioner of Internal Revenue.

Commissioner of Internal Revenue,
vs.
Cavour Hartley, Exr.

The Clerk will enter our appearances as Counsel for the Commissioner.

JOHN MacC. HUDSON,
Special Assistant to the Attorney General.

(Endorsed): Filed in U. S. Circuit Court of Appeals, May 10, 1934.

(Order of Submission in Causes Nos. 9946 and 9943.)

May Term, 1934.

Thursday, May 31, 1934.

These causes, Nos. 9946 and 9943, were called for hearing in their regular order and receipt of Brief of J. M. Richardson Lyeth and Ben R. Clark, as amici curiae, Counsel for Frederick P. Burrall, et al., as Executors of the last Will and Testament of John M. Longyear, deceased, with motion for leave to file same made a part thereof, was brought to the Court's attention and counsel for respective parties con-

senting, leave by the Court was granted to file same. Argument was then commenced by Mr. H. C. Fulton, counsel for Hartley, Executor, etc., continued by Mr. William B. Fryberger, counsel for same party, by Mr. John MacC. Hudson, Special Assistant to the Attorney General, for the Commissioner of Internal Revenue, and concluded by Mr. H. C. Fulton, counsel for Hartley, Executor, etc.

Thereupon, these causes were submitted to the Court on the transcript of the record from said Board of Tax Appeals and the briefs of counsel filed herein.

(Opinion in Causes Nos. 9946 and 9943.)

United States Circuit Court of Appeals,
Eighth Circuit.

No. 9946.—MAY TERM, A. D. 1934.

Cavour Hartley, Executor of the Estate of G. G. Hartley, Petitioner, vs. Commissioner of Internal Revenue, Respondent.	On Petition to Review Decision of United States Board of Tax Appeals.

No. 9943.—MAY TERM, A. D. 1934.

Commissioner of Internal Revenue, Petitioner, vs. Cavour Hartley, Executor of the Estate of G. G. Hartley, Respondent.	On Petition to Review Decision of United States Board of Tax Appeals.

[July 6, 1934.]

Mr. H. C. Fulton and Mr. William B. Fryberger (Messrs. Fryberger, Fulton & Boyle were with them on the brief), for Cavour Hartley, Executor.

Mr. John MacC. Hudson, Special Assistant to the Attorney General (Mr. Frank J. Wideman, Assistant Attorney General, and Mr. Sewall Key, Special Assistant to the Attorney General, were with him on the brief), for Commissioner of Internal Revenue.

Mr. J. M. Richardson Lyeth and Mr. Ben R. Clark filed brief as amici curiae.

Before STONE and GARDNER, Circuit Judges, and JOYCE, District Judge.

STONE, Circuit Judge, delivered the opinion of the court.

These are cross appeals from an order of the Board of Tax Appeals which affirmed in part and reversed in part a redetermination (November 22, 1928) by the Commissioner of income taxes due, for the taxable years 1924 and 1925, from the executor of the estate of G. G. Hartley, who died January 11, 1922, possessed of real, personal and mixed property of approximately $3,000,000.

The appeal (No. 9946) of the executor involves three claimed errors as follows:

I. Use of the value of the estate property at the date of death of Hartley instead of value at time of acquisition of property by him as the basis of computing for the above tax years the gain or loss on property sold in those years and the allowance of depreciation or depletion of such properties;

II. Rejection in whole or part of certain salary and expense items claimed as deductions;

III. Rejection of deductions, claimed on account of alleged net loss for the tax year 1923, carried forward into 1924 and 1925.

The appeal of the Commissioner (No. 9943) involves a claimed error in holding that the full amount of salaries and expenses paid in the tax year 1924 was proper deductible expense, thereby rejecting the determination of the Commissioner that a portion thereof should be disallowed as incurred for purposes other than the business of the estate.

I.

BASIS OF VALUATION.

This point is whether in estimating property gains and losses from sales of property ar depletion or depreciation of such properties the basic value is that of acquisition cost to the testator or of value at death of the testator. This question is presented without dispute as to facts and is, therefore, purely a question of law. The applicable law is to be found in the Acts of Congress, Departmental Regulations in accordance with such Acts and judicial decisions construing such Acts and such Regulations.

These returns were made under and these taxes are governed by the Revenue Acts of 1921 (42 Stat. 227) and 1924 (43 Stat. 253). Neither of these Acts contains any separate provision expressly defining this basis as applied to income of estates of deceased persons in course of administration. Both the 1921 Act (Sec. 202) and the 1924 Act (Sec. 204) define, generally, the "Basis for Determining Gain or Loss" from sale or other disposition of property during the tax year and the Act of 1924 (Sec. 204) also defines the basis for "Depletion, and Depreciation". These definitions are under "Part I.—General Provisions" of "Title II.—Income Tax" and; therefore, should be taken as generally applicable to all taxpayers subject to taxation under Title II, unless subsequently qualified in the Act. There are no such express qualifications here pertinent. Generally speaking and as far as here material, the basis declared in the above Acts is the value (measured by cost or inventory) of acquisition by the taxpayer. It was not until the Revenue Act of 1928 (45 Stat. 791) that Congress declared a rule specifically applicable to gains and losses from sales by executors and administrators of property coming from the testator. In Section 113 (a) (5) (45 Stat. 819) it is declared "If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of decedent." This provision was effective May 28, 1928, 8 A. M., and was not retroactive. However, there was a provision in Section 702 (45 Stat. 879) which applied to earlier tax years. Subsection "(a)" of that section provided that where returns of such gains or losses had been made for a prior tax year either on the basis of value at decedent's death or on a basis "in accordance with the regulations in force at the time such return was filed", such used basis should control "unless claim for refund or credit in respect of such basis, or a written election not to come within the provisions of this

subsection" be filed by the estate within the limitation for filing claims. Petitioner here has duly filed such written election and is, therefore, not bound by this subsection. Subsection "(b)" declares that where subsection (a) does not govern, the basis for such gain or loss shall be "such basis as is in accordance with the law properly applicable thereto, without regard to any provision of this Act." The situation resulting from the above state of statutory law and from petitioner's election under Section 702 (a) is that there is no applicable statutory expression specifically dealing with the proper basis for estates of decedents.

In promulgating Regulations for carrying out the Revenue Act of 1918 (similar to the Acts of 1921 and 1924 in the matter involved here), the Department declared that the basis of estimating gains or losses on sales by an executor in calculating income taxes of the estate was the value at death of decedent. This continued the administration rule under similar Regulations as to the Acts of 1921, 1924 and 1926 until the decision of the Court of Claims in *McKinney* v. *United States* (62 Ct. Cl. 180), on May 3, 1926, which held that the basis was not value at death of decedent but acquisition value to him. Conforming to this decision, the above Regulation was replaced by one making the basis the value of acquisition by decedent. This change remained in effect several months until the decision by the Court of Claims in *Nichols* v. *United States* (64 Ct. Cl. 241), on November 7, 1927. Construing the Nichols case as overruling the McKinney case, the Department restored its former Regulation and this continued the administrative rule until passage of the Revenue Act of 1928.

The force of these Regulations in the matter before us is twofold. First, it settles the purpose of Section 702 of the Act of 1928 to be one of repose for taxpayers (not barred by limitations) who were satisfied with the basis of their returns made in accordance with value at decedent's death or in accordance with Regulations existing at the time of return. Secondly, the fact that the Regulations in force when the Acts of 1921, 1924 and 1926 were, without material change, enacted had for years continuously prescribed date of death as the basis and the first Act (that of 1928) enacted after such Regulations had been questioned prescribed that basis argue strongly for application of the rule of statutory construction that such undisturbed administrative construction is the one intended by Congress (*United States* v. *Dakota-Montana Oil Co.*, 288 U. S. 459, 466; *Mass. Mut. Life Ins. Co.* v. *United States*, 288 U. S. 269, 273; *Murphy Oil Co.* v. *Burnet*, 287 U. S. 299, 307; *Brewster* v. *Gage*, 280 U. S. 327, 336-337).

As to the decisions, there is a direct conflict. Those announcing the basis as being value at death of the decedent are *Bray, Administratrix*, 4 B. T. A. 42; *Straight, Executrix*, 7 B. T. A. 177; *Bankers Trust Co.* v. *Bowers*, 23 Fed. (2d) 941, Dist. Ct. N. Y. Those announcing the basis as being value or cost of acquisition to decedent are the following in the Court of Claims: *McKinney* v. *United States*, 62 Ct. Cl. 180 (cer. denied 273 U. S. 716); *Elmhirst* v. *United States*, 38 Fed. (2d) 915 (same as *Straight, Executrix*, 7 B. T. A. 177, above); *Myers* v. *United States*, 51 Fed. (2d) 145; and see last paragraph of opinion in *McCann* v. *United States*, 48 Fed. (2d) 446. Able discussions for the former basis are in the Straight and Bankers Trust Company cases and the dissenting opinion in the Myers case; the same as to the latter basis are in the McKinney and Elmhirst cases. Also, see *Bingham* v. *Long*, 249 Mass. 79, 144 N. E. 77.

Expressions in *Brewster* v. *Gage*, 280 U. S. 327, have been urged by the Commissioner as being a determination of this matter in his favor here. The executor argues that these expressions are *dicta*. The expressions intended are as follows (p. 335):

"The Revenue Act of 1918 and subsequent Acts taxed incomes of estates during the period of the administration including profits on sales of property, and such gains are calculated on value at date of decedent's death.* There appears to be no reason why gains or losses to the estate should be calculated on one basis and those to the residuary legatees on another."

That case involved the question of date of acquisition by a residuary legatee of personal property which he had sold in the taxable years involved. The controversy was whether his acquisition for tax purposes was the date of death of the testator or the date of distribution to the legatee. While the question there was different from that here, yet the language above quoted is the expression by the Court of one reason for its decision. It is a well considered opinion. This language was not lightly used and it may not be lightly put aside. Though not spoken as to the matter now before us, we would hesitate to regard it other than as on the very edge of controlling authority.

Much has been well said on either side in the above cases and the matter is far from being free from doubt. It seems to us,

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*"Section 219, Revenue Act of 1918, 40 Stat. 1071; Regulations 45, Art. 343.
Section 219, Revenue Act of 1921, 42 Stat. 246; Regulations 62, Art. 343.
Section 219, Revenue Act of 1924, 43 Stat. 275; Regulations 65, Art. 343.
Section 219, Revenue Act of 1926, 44 Stat. 32; Regulations 69, Art. 343."

however, that the predominance is in favor of construing the intent of Congress to be that the basis should be value at death of the decedent.

Since Congress has not expressly spoken on this specific matter in the Acts earlier than 1928, we must seek its intent from the more general provisions of the Acts—particularly those here involved, of 1921 and 1924. Both Acts define an estate of a decedent as a "taxpayer" (42 Stat. 227, Sec. 1; 43 Stat. 253 and 254, Sec. 1); both specifically provide for taxation of the income of an estate during administration (42 Stat. 246, Sec. 219; 43 Stat. 275, Sec. 219); both include profits from sale of property by the taxpayer in taxable income (42 Stat. 237, Sec. 213; 43 Stat. 256, Sec. 203) and each establishes the basis of calculating gain or loss by such sales as the value on March 1, 1913, or the latter date of acquisition (42 Stat. 229, Sec. 202; 43 Stat. 258, Sec. 204). Also, in the same Acts and as part of the general scheme of taxation under each Act is a "Title" providing for Estate Taxes of deceased persons and the "gross estate" for purposes of such taxes is "the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated" (42 Stat. 278, Sec. 402; 43 Stat. 304, Sec. 302).

From the above statutory provisions, as well as others in these Acts, not here particularly referred to, it is clear that the estate of a decedent is made a taxable unity or entity[1] both for estate taxes and for income taxes. Also, it is clear that in estimating income taxes gain or loss from sales during a taxable year are applicable to estates and also that in determining such gain or loss the value at acquisition by the taxpayer is the basis. The executor or administrator is the taxpayer of such an estate. There is no difficulty in applying to him the general statutory requirement, applicable to all individual taxpayers, that the basis shall be value at acquisition by the taxpayer. The time of acquisition by the executor or administrator is the date of his decedent's death. The value at that date conforms to the statutory basis.

The manner of acquisition is not important. The statutes clearly apply this basis to acquisitions of a closely similar character (42 Stat. 229, Sec. 202 (a), (3); 43 Stat. 258, Sec. 204 (5). The important consideration is that the statutes establish or recognize certain entities for income taxation purposes—one of these being an estate of a decedent during administration and settle-

[1] *Merchants L. & T. Co. v. Smietanka*, 255 U. S. 509, 516; *Reynolds v. Cooper*, 64 Fed. (2d) 644, 647, C. C. A. 10; *Bankers Trust Co. v. Bowers*, 295 Fed. 89, 94, C. C. A. 2; *Catherwood v. United States*, 291 Fed. 560, C. C. A. 3.

ment—and the measure prescribed for determining taxable income arising from gains or losses through sale or other realization upon property by such an entity is confined to such gains or losses accruing to such entity and no other—they are not concerned with what has happened before the property became that of the entity being taxed (*Anderson* v. *Wilson*, 289 U. S. 20, 26-27; *Brewster* v. *Gage*, 280 U. S. 327, 335; *Merchants' Loan & Trust Co.* v. *Smietanka*, 255 U. S. 509, 516-517; *Busch* v. *Commissioner*, 50 Fed. (2d) 800, 802, C. C. A. 5; *McCann* v. *United States*, 48 Fed. (2d) 446, 448, Ct. Cl.; *Abell* v. *Tait*, 30 Fed. (2d) 54, 55, C. C. A. 4; *Whitcomb* v. *Blair*, 25 Fed. (2d) 528, 529, C. A. Dist. of Col.; *Baltzell* v. *Mitchell*, 3 Fed. (2d) 428, 431, C. C. A. 1, cer. den. 268 U. S. 690; *Bankers' Trust Co.* v. *Bowers*, 295 Fed. 89, 94, C. C. A. 2; *Nichols* v. *United States*, 64 Ct. Cl. 241, cer. denied 277 U. S. 584).

If there be doubt as to the meaning of these statutes when all pertinent parts are considered, then another reason for construing the statutes as fixing the basis as being value at death of the decedent is that the basis must be either that or acquisition value to the decedent and that the latter would lead to injustice. The injustice arises from the situation that the "gross estate" prescribed for the Estate Tax is the value of all property of decedent at the time of death. Such valuation necessarily reflects increases or decreases in value of each property item occurring between time of acquisition by decedent and time of his death—if the value has increased that increase is taxed while if it has decreased that decrease diminishes the gross estate value to the same extent. Thus, such increase or decrease directly affects the amount of Estate Tax. From this situation, the injustice of making acquisition value to decedent the basis for income taxation of the estate manifests itself in one of two ways (dependent on the movement of value of the property) and results either in double taxation or in escape (partial or entire) from taxation intended by the statutes. The only other basis suggested as possible—the use of value at death of decedent—avoids both of these results and, therefore, should be adopted as the meaning of the statutes since there is nothing in the entire expression in these two income tax statutes forbidding or even inconsistent with its use. This rule that statutes should be construed to prevent hardship or unjust consequences unless the language of the statutes compels a different conclusion is here applicable, is salutary and is firmly established (*Burnet* v. *Guggenheim*, 288 U. S. 280, 285; *Knowlton* v. *Moore*, 178 U. S. 41, 77; *Piper* v. *Willcuts*, 64 Fed. (2d) 813, 814, C. C. A. 8; *Grier* v. *Kennan*, 64 Fed. (2d) 605, 607, C. C. A. 8; *Missouri*

Pac. R. Co. v. *Holt*, 293 Fed. 155, 162, C. C. A. 8, cer. denied, 264 U. S. 584; *Bankers' Trust Co.* v. *Bowers*, 295 Fed. 89, 96, C. C. A. 2).

We must conclude that the Board correctly affirmed the action of the Commissioner in taking value at time of death of Hartley as the basis for estimating gain or loss on sales, during these tax years, by the executor of property belonging to the estate. For the same general reasons, estimates of depreciation or depletion of such properties should be upon the same value basis.

II.

DEDUCTION OF SALARY AND EXPENSE ITEMS IN 1925.

In taxpayer's returns for these years (1924 and 1925), he claimed certain deductions for salaries, for expenses and for accountant's fees. The Commissioner materially reduced each of these items for each year. The Board reversed this determination of the Commissioner as to the items in 1924 (allowing them in full) but sustained the reductions as to 1925. It is of this latter action, the executor here complains.

The estate of Hartley included various securities, fifteen iron mines operated under royalty leases, and several thousand pieces of real estate (consisting of farms and improved city rental properties). In the conduct of this business, decedent maintained a considerable office organization which was supervised by a general office manager who employed assistants, bookkeepers, stenographers, and an engineer who supervised collection of royalties on the iron mines. This organization was continued by the executor and was in operation during 1924 and 1925. The items claimed as deductions for these two years were the salaries and expenses of this organization and certain accountant fees. There was no distribution of the estate until February 24, 1925. On that date there was distribution of all of the personalty (except certain bonds necessary to provide annuities required by the will), the home place and one quarter section of land in Itasca County on which was an iron mine. There was no other distribution of real estate until 1928. After this distribution this organization continued conduct of the distributed properties as if they were still included in the estate. The value of the distributed property was apparently above two-thirds of the value of the entire estate.

There is no claim that these expenditures were not proper or necessary. The Commissioner disallowed something more than

one-third of the salaries ($6,191.67), one-half the expenses ($1,027.30), and more than two-thirds of the accountant ($1,663.14) items for 1925. His reason as to all was an apportionment between estate and distributed property service and as to the accountant item the additional reason that some of such service was attributable to administration of the estate and not to the income-producing business of the estate. The Board sustained the Commissioner as to these reductions on the ground that the executor had "failed to overcome the presumptive correctness of the respondent's determination."

The executor is silent here as to the item of accountant's fees. As to salaries and expenses there is no opposition here to an apportionment because of the distribution but the claims are: First, that since the distribution did not occur until after two months (roughly) of 1925 had passed, one-sixth of the salaries and expenses should be allowed *in toto;* and, second, that the property distributed was of a character (securities and only one mine) requiring little time and effort from the organization while that remaining in the estate (consisting of mines and real estate holdings) require much time and attention. There is an appealing plausibility in this argument but the record here is barren of any facts wherefrom we can say with proper certainty that the Commissioner and the Board both have erred and if so to what extent. We must conclude that the Board was correct in its statement and conclusion as to this matter.

III.

LOSSES OF 1923.

In 1923, the estate paid the federal estate tax on this estate. This resulted in a net loss to the estate for that year. This loss the executor seeks to carry forward into 1924 (in the amount of $75,100.60) and 1925 ($52,820.57) under the provisions of Section 206 of the Act of 1924 (43 Stat. 260). The Board sustained rejection of these deductions on two grounds: First, no evidence of loss sustained in 1923; and, second, even if the amount of loss had been established, it could not be carried forward into a subsequent year. The executor contends: First, that a stipulation before the Board withdrew the question of amount of loss and left that to be determined under "Rule 50" and, therefore, only the law question of the propriety of carrying forward a loss was before the Board; and second, that the statute authorized carrying forward of such loss. We need determine only the second contention.

The executor properly concedes that the statute providing for carrying forward losses applies only to losses resulting from operation of a business by the taxpayer (*Dalton* v. *Bowers*, 287 U. S. 404; *Ames* v. *Commissioner*, 49 Fed. (2d) 853, 854, C. C. A. 8; *Refling* v. *Burnet*, 47 Fed. (2d) 859, 860, C. C. A. 8). His contention is that the estate was carrying on a business and that the estate tax is an expense and loss of such business because it is a lien upon all the property of the estate and it is only by paying such tax that the estate and its business can be preserved. It may be conceded that this estate was carrying on a business within the meaning of the statute and that the preservation of the estate and of its business required payment of the tax but that does not meet the statutory requirement that the loss must arise from and out of the *operation* of the business (see cases last above cited). An estate tax arises from passage of property from a decedent and is upon the privilege of such transfer (*Chase Nat. Bank* v. *United States*, 278 U. S. 327, 334; *Young Men's Christian Ass'n.* v. *Davis*, 264 U. S. 47, 50; *Schuette* v. *Bowers*, 40 Fed. (2d) 208, 210, C. C. A. 2; *Frew* v. *Bowers*, 12 Fed. (2d) 625, 626, C. C. A. 2). It has no legal connection with the operation of a business and cannot arise from or out of such operation. The contention must be denied (see *Ames* v. *Commissioner*, 49 Fed. (2d) 853, 854, 855, C. C. A. 8 and *Refling* v. *Burnet*, 47 Fed. (2d) 859, 860, 861, C. C. A. 8).

PETITION OF THE COMMISSIONER.

The complaint of the Commissioner here is that the Board erred in rejecting his reduction of the salaries, expenses and accountant's fees claimed as deductions by the taxpayer for the year 1924. In the notice of deficiency the reasons stated by the Commissioner for the disallowance was that a portion of the salaries and expenses was for services on distributed property and a portion of the accountant's fees were for service in connection with the administration of the estate as distinguished from the business of the estate. The Commissioner now takes the position that he contended before the Board that the reductions in salary and expense items should stand because a portion of the services covered thereby were for administration matters as distinguished from the business of the estate. The Board ruled against the salary and expense reductions because there was no distribution of the estate before 1925. As reflected in the deficiencies ordered by the Board, this seems to have been treated as a ruling on accountant's fees also.

As to salaries and expenses, there is no warrant in the record for the contention that the Commissioner urged before the Board the matter of administration service as a ground for the reductions, therefore, we pass that by as not being before us. Obviously, the ground of distributed estate is not sound since there was no distribution of any part of the estate until the following year of 1925.

As to accountant's fees the record is different. The deficiency notice bases the reduction of $1,400.21 (from $2,000.21) "as being administrative work in connection with income tax of decedent and Federal Estate Tax." The Board made no specific finding or statement in its opinion regarding this item. The entire evidence before the Board on this matter was by the accountant, as follows: "The accountant's fees for the years 1924 and 1925, noted in the returns, were for services rendered almost altogether in connection with the current affairs of the estate as accountant and income tax advisor and the amounts are set forth in the sixty day letter accompanying the petition. I was engaged during this period, to a considerable extent, in looking over the tax matters of Mr. Hartley, prior to his death, and the final settlement of those old cases came before the Board of Tax Appeals, I think, largely about 1928, and my services in that connection were paid principally at the conclusion of the contest on those cases."

This evidence is rather confusing but it does clearly state that considerable time was devoted by the accountant to matters concerned with the income tax of the decedent. Obviously, such services are not deductible from the income of the estate because they relate entirely to matters occurring before there was any such estate and are administration charges against the estate. Since this evidence shows there should be a reduction in this respect and since it fails to show that the reduction made by the Commissioner is erroneous, we think the Board erred in denying this reduction.

CONCLUSION.

The order of the Board is modified to the extent of reducing the allowable deduction for accountant's fees for 1924 by $1,400.21 and as so modified is affirmed. The cause is remanded to the Board for proceedings in accord with this modification.

126 (Decree in Causes Nos. 9946 and 9943.)

United States Circuit Court of Appeals,
Eighth Circuit.

May Term, 1934.

Monday, July 9, 1934.

Cavour Hartley, Executor of the Estate of G. G. Hartley,
Petitioner,
No. 9946. vs.
Commissioner of Internal Revenue.

On Petition to Review Decision of United States Board of Tax Appeals.

Commissioner of Internal Revenue, Petitioner,
No. 9943. vs.
Cavour Hartley, Executor of the Estate of G. G. Hartley.

On Petition to Review Decision of United States Board of Tax Appeals.

These matters came on to be heard on petitions (cross-appeals) to review an order of the United States Board of Tax Appeals which affirmed in part and reversed in part a determination by the Commissioner of Internal Revenue of income taxes due, for the taxable years 1924 and 1925, from the Executor of the Estate of G. G. Hartley, deceased, and was argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged and decreed, by this Court, that the order of the said Board of Tax Appeals in these matters, be, and the same is hereby modified to the extent of reducing the allowable deduction for accountant's fees for the year 1924 by One Thousand Four Hundred and 21/100 ($1,400.21) Dollars, and as so modified the said order is hereby affirmed.

127 It is further ordered that these matters be, and the same are hereby, remanded to the said Board of Tax Appeals for proceedings in accord with this modification.

July 9, 1934.

128 United States Circuit Court of Appeals,
Eighth Circuit.

Tax Review.

Cavour Hartley, Executor of the Estate of G. G. Hartley,
Petitioner,
No. 9946. vs.
Commissioner of Internal Revenue, Respondent.

Commissioner of Internal Revenue, Petitioner,
No. 9943. vs.
Cavour Hartley, Executor of the Estate of G. G. Hartley,
Respondent.

Petition for Rehearing and/or Amendment of Opinion.

To the Honorable Judges of the United States Circuit Court of Appeals for the Eighth Circuit:

Comes now Cavour Hartley, executor of the estate of G. G. Hartley, petitioner and respondent, respectively, in the two cross appeals above named and respectfully presents this petition for a reconsideration of the opinion in the above named causes, which opinion was filed on the 6th day of July, 1934, upon a single material point or statement of fact in which petitioner believes the court inadvertently fell into substantial error; and which is of a serious nature requiring correction:

Petitioner respectfully points out that:

In the opinion of the court (on pages 12 and 13 of the typewritten copy forwarded to counsel by the clerk of the above named court) the following statement appears:

"As to accountant's fees the record is different. The deficiency notice bases the reduction of $1,400.21 (from
129 $2,000.21) 'as being administrative work in connection with income tax of decedent and Federal Estate Tax.' The Board made no specific finding or statement in its opinion regarding this item. The entire evidence before the Board on this matter was by the accountant, as follows: 'The accountant's fees for the years 1924 and 1925, noted in the returns, were for services rendered almost altogether in connection with the current affairs of the estate as accountant and income tax advisor and the amounts are set forth in the sixty day letter accompanying the petition. I was engaged during this period, to a considerable extent, in looking over the tax matters of Mr. Hartley, prior to his death, and the final settlement of those old cases came before the Board of Tax Appeals, I think, largely about 1928, and my services in

that connection were paid principally at the conclusion of the contest on those cases.'

"This evidence is rather confusing but it does clearly state that considerable time was devoted by the accountant to matters concerned with the income tax of the decedent. Obviously, such services are not deductible from the income of the estate because they relate entirely to matters occurring before there was any such estate and are administration charges against the estate. Since this evidence shows there should be a reduction in this respect and since it fails to show that the reduction made by the Commissioner is erroneous, we think the Board erred in denying this reduction."

The following testimony, taken word for word from the official report of proceedings before the United States Board of Tax Appeals by E. J. Walton, official reporter of the United States Board of Tax Appeals, is all the testimony relative to accountant's fees given by Mr. Frank Wilson at the hearing of the above cause before the United States Board of Tax Appeals at St. Paul, Minnesota, on July 26, 1932:

"Direct Examination.

By Mr. Fryberger:

Q. For the purpose of the record, will you state your name and business?

A. Frank W. Wilson, public accountant.

Q. Have you had charge of the accounting, making up of these returns in the Hartley Estate, from time to time?

A. I have.

Q. And are you familiar with such returns and the figures of the estate?

130 A. I am.

Q. Now, calling your attention to the return for 1924 and 1925, was there any election in writing made in reference to those matters? A. There was, yes.

Q. State the facts and details concerning that matter.

A. Under the provisions of Section 702 of the Revenue Act of 1928, I filed with the Commissioner of Internal Revenue the election of the executor of the estate of G. G. Hartley, not to come within the provision of sub-section A of said Section 702 of the Revenue Act of 1928. I filed that election on July 27, 1928.

Q. For both years?

A. For all years prior to the date of the filing of the election.

Q. Anything further with reference to that matter that you wish to testify to? A. Nothing at all.

Q. Now, calling your attention to the accountant's fees of 1924 and 1925, will you give the details with reference to that, and what it was for?

A. The amounts paid in those years were for services rendered almost altogether in connection with the current affairs of the estate, as accountant and income tax advisor.

Q. The amounts are in the record?

A. The amounts are set forth in the sixty-day letter accompanying the petition.

Q. Have you any further testimony to give along that line?

A. None, except to state that during this period I was engaged to a considerable extent in working over the tax matters of Mr. Hartley prior to his death. The final settlement of those old cases came before this Board, I think, largely, about 1928, and my services in that connection were paid principally at the conclusion of the contest of those cases.

Mr. Fryberger: I think that is all.

Mr. Coon: No cross-examination."

The testimony relative to accountant's fees quoted in the excerpt of opinion above set forth is in the narrative form. A reading of the testimony in this form might well leave some confusion in the Court's mind, but the actual testimony on this point which petitioner has taken the liberty of
131 setting out here as adduced before the Board leaves no doubt as to its true meaning.

Petitioner respectfully points out that from this testimony it is clear that the amounts paid Mr. Wilson for accountant's fees during 1924 and 1925, which were the only amounts claimed by petitioner as deductions for accountant's fees in his returns for those years were for services rendered in connection with the current affairs of the estate.

Petitioner further respectfully points out, that the fees earned by Mr. Wilson in connection with tax matters arising prior to Mr. Hartley's death were not paid in 1924 and 1925, but at the conclusion of those cases in 1928 and no attempt was made to include these fees in the deductions claimed in the 1924 and 1925 returns.

In other words, the accountant's fees incurred in connection with the current affairs of the estate in 1924 and 1925 were paid during those years, were claimed as deductions in

taxpayer's returns for those years, and were at all times kept separate and distinct from the accountant's fees earned for work done on tax matters arising prior to Mr. Hartley's death. Payment for that work was not made until 1928 and those items were never included in the deductions, petitioner claimed in his income tax returns for 1924 and 1925.

The witness in his statement: "my services in that connection" was referring to the services rendered in connection with tax matters arising prior to Mr. Hartley's death. These cases arising prior to Mr. Hartley's death were matters entirely separated from the accountant's services rendered in connection with the income tax returns for 1924 and 1925, which latter items were paid for during those years and long prior to the payment in 1928 for services in connection with the tax matters arising prior to the death of the decedent.

We think the use of the narrative form and throwing the last sentence of the narrative referring to this 1928 payment in so close connection and in the same paragraph with the 1924 and 1925 payments has mislead the court as to the true intent and meaning of the accountant's testimony, all of which more fully appears from the official report of the proceedings before the United States Board of Tax Appeals. Apparently the Court has understood the testimony of the accountant to mean that his services for the income tax matters in 1924 and 1925 were paid for at the same time as these other services, which were actually paid for in 1928, while, as a matter of fact, they were entirely separate payments, having no connection with each other in time or purpose. We emphasize that while the accountant's work on the current affairs of the estate, for which deductions
132 were claimed, and on the tax matters arising prior to Mr. Hartley's death for which no deductions were claimed was to a certain extent done concurrently, that payments for each were separate, payments for work on the current affairs of the estate being made in 1924 and 1925 and the payment for services rendered in tax matters arising prior to Mr. Hartley's death, being made in 1928.

Thus, petitioner respectfully submits that the statements quoted from the opinion are not in accordance with the facts of record in this cause as shown above.

Wherefore, petitioner requests the Court to grant a rehearing on said disputed point or eliminate the statement above quoted from the said opinion, and correct and modify said opinion accordingly, and modify the conclusion of said

opinion to read: "The order of the Board of Tax Appeals is in all things affirmed."

Respectfully submitted,

CAVOUR HARTLEY,
Executor of the Estate of G. G. Hartley, Petitioner,
By H. B. Fryberger,
H. C. Fulton,
E. L. Boyle,
William B. Fryberger.

We hereby certify that the foregoing petition based upon facts appearing in the record of case is well found in law and in fact, and that it is not interposed for the purpose of delay.

Dated at Duluth, Minnesota, this 26th day of July, 1934.

H. B. FRYBERGER,
H. C. FULTON,
E. L. BOYLE,
WILLIAM B. FRYBERGER.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Aug. 2, 1934.

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133 (Order Denying Petition of Cavour Hartley for a Rehearing.)

October Term, 1934.

Wednesday, October 17, 1934.

The petition for rehearing in these causes, filed by counsel for Cavour Hartley, Executor, etc., having been considered, It is now here ordered by the Court that the same be, and it is hereby, denied.

October 17, 1934.

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134 (Clerk's Certificate.)

United States Circuit Court of Appeals,
Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the records on petition to review the decision of the United States Board of Tax Appeals as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the

supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in certain causes in said Circuit Court of Appeals wherein the Commissioner of Internal Revenue was Petitioner and Cavour Hartley, Executor of the Estate of G. G. Hartley, was Respondent, No. 9943, and wherein Cavour Hartley, Executor of the Estate of G. G. Hartley, was Petitioner, and Commissioner of Internal Revenue was Respondent, No. 9946, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that on the twenty-ninth day of October, A. D. 1934, a mandate was issued out of said Circuit Court of Appeals in said causes, directed to the United States Board of Tax Appeals.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this fifteenth day of December, A. D. 1934.

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Seal)

[fol. 135] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 4, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office Supreme Court, U.
FILED
DEC 27 1934
CHARLES ... CROP
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 602

CAVOUR HARTLEY, EXECUTOR OF THE ESTATE OF G. G. HARTLEY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

H. B. FRYBERGER,
H. C. FULTON,
E. L. BOYLE,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 602

CAVOUR HARTLEY, EXECUTOR OF THE ESTATE OF G. G. HARTLEY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable Charles Evans Hughes, Chief Justice, and Associate Justices of the Supreme Court of the United States of America:

Your petitioner, Cavour Hartley, as executor of the Estate of G. G. Hartley, deceased, respectfully prays that a writ of certiorari issue to review a decision and judgment of the United States Circuit Court of Appeals for the Eighth Circuit, entered in the above entitled cause on July 6, 1934 (72 F. (2d) 352), which decision and judgment affirmed in part and modified in part an order of the United States Board of Tax Appeals promulgated (March 16,

1933, 27 U. S. Bd. Tax. App. 952) in favor of the respondents and against the petitioners herein.

A petition for a rehearing of said matter was subsequently filed with the United States Circuit Court of Appeals for the Eighth Circuit and denied by the court on the 17th day of October, 1934 (R. 128).

Question Presented.

The sole question presented is whether in determining taxable income of decedent's estate, pending administration, the basis for computing gain or loss on sale, and depletion and depreciation of, properties of a decedent is the cost (or March 1, 1913, value) thereof to the decedent or the fair market value of same at the date of death of the decedent.

The taxpayer is the executor of the estate of G. G. Hartley, who died January 11th, 1922, leaving real, personal and mixed property valued at approximately $3,000,000.00 and producing about $200,000.00 gross income annually. Among the properties were about fifteen iron mines operated under royalty leases and several thousand pieces of real estate consisting of farms and city properties, improved and unimproved. The personal property not important here, consisted of a miscellaneous quantity of investment and income securities (R. 85 to 97).

The taxpayer duly filed his tax returns for 1924 and 1925. In the 1924 return he reported a loss of $1,184.39 and in the 1925 return he reported a gain of $255.05 from a sale of capital assets. Deductions were claimed for depreciation of iron mines in the amount of $41,663.62 for 1924, and $67,272.81 for 1925. The gain or loss on the sale of capital assets and the deduction for depletion and depreciation, as reported on the returns, were computed on the basis of the value of the several properties at the date of the decedent's death.

These returns were in compliance with the regulations of the Treasury Department existing at that time. Regulations 62, Art. 343 (1921 Act); Regulations 65, Art. 343 (1924 Act); and Regulations 69, Art. 343 (1926 Act). The regulations of the Department were amended on April 6, 1927, and the basis changed from value at date of death of decedent to cost to decedent. (T. D. 4011, VI-1 C. B. 77.) On July 7, 1928, the regulation was again changed to the basis of value at the date of death of the decedent. (T. D. 4177, VII-2 C. B. 134.) Upon audit of the returns, the Commissioner made numerous adjustments of profits from sales and of depreciation and depletion and determined the deficiencies in tax. On July 27, 1928, the taxpayer filed with the Commissioner a written election not to have the income tax returns of the estate governed by provisions of sub-section 702 (a) of the Revenue Act of 1928 (R. 20).

The value of the properties at the date of decedent's death and deductions for depletion and depreciation and the profit or loss on sales computed on the basis of the properties in the hands of the decedent (cost or March 1, 1913, value) were stipulated and the question submitted to the Board was whether the proper basis for computing gain or loss and depletion and depreciation is the value of the properties at the date of the decedent's death, as contended by the Commissioner, or the basis of the properties in the hands of the decedent—cost or March 1, 1913, value—as contended by the taxpayer (R. 34-35).

The Board of Tax Appeals held that the basis for computing gain or loss and depletion and depreciation was the value of the properties at the date of the decedent's death and the United States Circuit Court of Appeals for the Eighth Circuit sustained the Board in its decision.

The Reasons for Granting the Petition.

1. The United States Circuit Court of Appeals for the Eighth Circuit erred in holding that in computing gains and losses from sales of property and of depreciation of properties, the basic value is that of value at the date of death of the testator and not that of acquisition cost to the testator (or March 1, 1913, value) as contemplated by the applicable sections of the Revenue Acts of 1921 (Section 202 (a) (b), 42 U. S. Stat. at L. 229, and Section 219, 42 U. S. Stat. at L. 246, Chapter 136), and 1924 (Section 204 (a) (b), 43 U. S. Stat. at L. 258, and Section 219, 43 U. S. Stat. at L. 275, Chapter 234).

2. The United States Circuit Court of Appeals for the Eighth Circuit erred in applying to this case the decision of this Court in the case of *Brewster* v. *Gage*, 280 U. S. 327, in which case the controversy was whether acquisition for tax purposes by residuary legatee of personal property was the date of death of the testator or date of distribution to the legatee, and the language used therein and regarded by the United States Circuit Court of Appeals for the Eighth Circuit as on the very edge of controlling authority was merely argumentative and dicta.

3. The United States Circuit Court of Appeals for the Eighth Circuit erred in rejecting the doctrine established by the decisions of the Court of Claims holding that the true basis was the value on March 1, 1913, or cost of acquisition to taxpayer, in the cases of *McKinney* v. *United States*, 62 Ct. Cl. 180 (cer. denied 273 U. S. 716); *Elmhirst* v. *United States*, 38 F. (2d) 915 (same as *Straight, Executrix*, 7 B. T. A. 177), (cer. denied 282 U. S. 851); *Myers* v. *United States*, 51 F. (2d) 145, and in rejecting the petitioner's contention that the denial of the writ of certiorari

in those cases by this Court indicated the approval of the doctrine by this Court.

4. The question involved is one of importance and involves other similar conditions by taxpayers as appears by the brief *amici curiæ* filed in the United States Circuit Court of Appeals in this case. The question involved is important to taxpayers and to the Government.

5. The decision of the United States Circuit Court of Appeals for the Eighth Circuit is in conflict with the decisions of the Court of Claims and has decided an important question of general law in conflict with the weight of authority. *McKinney* v. *United States*, 62 Ct. Cl. 180 (cer. denied 273 U. S. 716; *Elmhirst* v. *United States*, 38 F. (2d) 915 (same as *Straight, Executrix*, 7 B. T. A. 177) (cer. denied 282 U. S. 851); *Myers* v. *United States*, 51 F. (2d) 145, and *McCann* v. *United States*, 48 F. (2d) 446; and *Nichols* v. *United States*, 64 Ct. Cl. 241 (cer. denied 277 U. S. 584.)

For these reasons it is respectfully submitted that this petition for writ of certiorari to review judgment of the United States Circuit Court of Appeals for the Eighth Circuit be granted.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 602

CAVOUR HARTLEY, EXECUTOR OF THE ESTATE OF G. G. HARTLEY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the Board of Tax Appeals (R. 20) is reported in 27 B. T. A., page 952. The opinion of the Circuit Court of Appeals for the Eighth Circuit (R. 112) is reported in 72 Federal (2d), page 352.

Jurisdiction.

The petition for rehearing was denied by the Circuit Court of Appeals for the Eighth Circuit on the 17th day of October, 1934 (R. 128). Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. The petition for certiorari was filed December 27, 1934.

Questions Presented, Statutes Involved, etc.

A statement of the question presented, specification of errors, a statement of the case, and the statutes and regulations involved will be found in the petition.

ARGUMENT.

The question in this case is whether the true basis for computing gain or loss upon sales by the executor of an estate and depletion and depreciation of the property is the value at the date of decedent's death, or the cost to decedent (or March 1, 1913, value). The former is termed the "old basis" and the latter the "new basis."

This question was submitted to the Board of Tax Appeals by stipulation of the parties as a pure question of law and the decision of the Board adopted as the basis of the value at the time of decedent's death. Upon the taxpayer's appeal this decision of the Board was sustained by the Circuit Court of Appeals for the Eighth Circuit. The Commissioner filed a cross-appeal upon another proposition. Upon motion the appeals were consolidated and heard together by order of court and the decision of the Board of Tax Appeals was modified upon this cross-appeal. The proposition involved in the cross-appeal is not material here and is not in any way involved or affected by the question here. (R. 108 and 121.)

The laws applicable to the question here are the 1921 and 1924 statutes.

The 1921 statutes to be interpreted read as follows:

> "SEC. 202. (a) That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal, or mixed, acquired after February 28, 1913, shall be the cost of such property; * * *"

"(b) The basis for ascertaining the gain derived or loss sustained from the sale or other disposition of property, real, personal, or mixed, acquired before March 1, 1913, shall be the same as that provided by subdivision (a);—

(1) If its fair market price or value as of March 1, 1913, is in excess of such basis, the gain to be included in the gross income shall be the excess of the amount realized therefor over such fair market price or value;

(2) If its fair market price or value as of March 1, 1913, is lower than such basis, the deductible loss is the excess of the fair market price or value as of March 1, 1913, over the amount realized therefor; and

(3) If the amount realized therefor is more than such basis but not more than its fair market price or value as of March 1, 1913, or less than such basis but not less than such fair market price or value, no gain shall be included in and no loss deducted from the gross income."

42 U. S. Statutes 227, Section 202 (a) and (b).

The 1924 statute does not differ materially from that of 1921 upon this proposition. 43 U. S. Stat. at L. 258, Sec. 204 (a) (b).

The Act of 1924, Section 204, sub-division (c), also fixed the basis for depletion and depreciation the same as provided in (a) or (b) for gain or loss from sales. These provisions were generally applicable to all taxpayers without specific mention of gains or loss from sales by executors or administrators and it was not until the Revenue Act of 1928 (45 Statutes 791) that Congress declared a rule specifically applicable to gains or losses from sales by executors or administrators from property of the testator. (45 U. S. Statutes 791, 819, Sec. 113 (a), sub-division 5.)

Commissioner's Regulations 45, 62, 65, Art. 343, were practically identical in interpreting the Revenue Acts of 1918, 1921, 1924, fixed the basis as follows:

> "Wherever the executor sells property of the estate for more than its value at the time of the death of the decedent, the excess is income taxable to the estate."

On May 3, 1926, the Court of Claims in the case of *McKinney* v. *United States*, 62 Ct. Cl. 180, interpreted the 1918 Statute—which was not materially different upon this proposition from these later statutes, as fixing the true basis as the cost to the testator (or March 1, 1913, value), and not the market value at the date of death of the testator. In the light of this decision, and after the denial of the petition for writ of certiorari by this Court, the Commissioner amended his regulation to conform to the decision.

The ground of the court's decision was that the statute had for its purpose the taxation of "gain derived from the sale" of property, based upon the difference between the original investment and the sale price, and the allowance of loss sustained measured in the same way, and that to adopt as the basis the appraised value at the time of death of the testator would, in many cases, amount to the assessing of taxable gain although there was an actual loss as between the purchase price and the sale price, or between the March 1, 1913, value and the sale price.

The court's decision and its reasoning was based upon the decisions of this Court in the *Goodrich* case, where the original cost was greater than the March 1, 1913, value and the selling price was less than the cost, but greater than the March 1, 1913, value, and the court held that there was no profit (*Goodrich* v. *Edwards*, 255 U. S. 527); and upon the *Walsh* case, where the cost was greater than the March 1, 1913, value and the same as the selling price and this Court held there was no profit; and again in the same case,

where the cost was greater than the March 1, 1913, value but less than the selling price, that the profit was limited to the excess of the selling price over the cost (*Walsh* v. *Brewster*, 255 U. S. 536). Also the *Flannery* case in which the cost was less than the March 1, 1913, value and the selling price was more than the cost but less than the March 1, 1913, value, and this Court held there was no loss. (*United States* v. *Flannery*, 268 U. S. 98.) In other words the Court of Claims adhered to the doctrine of "actual gains and losses" and so interpreted the decisions of this Court.

The Commissioner having amended his regulations to conform to this decision of the Court of Claims, for a period of fifteen months from April 6, 1927, to July 7, 1928, all adjustments were made upon this "new basis" of cost to the testator.

The Court of Claims in the meantime had handed down its decision in the case of *Nichols* v. *United States*, 64 Ct. Cl. 241, holding that commissions of a partner earned by the firm prior to his death, but collected by the executor after his death—both the partner and his executor keeping their accounts on a cash receipt basis—was a part of the corpus of his estate and not subject to tax as income. The Commissioner interpreted this decision as a reversal by the Court of Claims of its prior decision in the *McKinney* case, and changed the Regulation back to the "old basis" of value at the date of death of the testator.

A Federal District Court in the Southern District of New York in the case of *Bankers Trust Company* v. *Bowers*, 23 Federal Reporter (2d ser.), page 941, adopted the so-called "old basis" rule basing the decision upon the ground that the court was unable to reconcile the decision in the *Nichols* case with the decision in the *McKinney* case. The Board of Tax Appeals, in the case of *Dorothy Payne Whitney Straight, Executrix*, v. *United States*, 7 United States

Board of Tax Appeals, page 177, with four members dissenting, also re-affirmed the "old basis", but this decision was overruled by the Court of Claims in the case of *Elmhirst* v. *United States,* 38 Federal Reporter (2d ser.), page 915, hereinafter cited, and which is the same case on appeal as *Dorothy Payne Whitney Straight, Executrix,* case.

With the Court of Claims laying down one basis and the Board of Tax Appeals and this Federal District Court using a different basis, a condition of confusion existed and the executors of estates were filing some under one basis and some under the other (R. 22). Congress then sought to put an end to this chaotic condition and in the Revenue Act of 1928 specifically provided that from and after May 29, 1928, the basis should be the value at the death of the testator. Congress, however, did not make the Act retroactive but specifically provided that where returns of such gains or losses had been made for a prior tax year on either basis, in accordance with the regulations in force at the time such return was filed, such basis should control unless a claim for refund in respect to such basis was made or a written election not to come within the provisions of this subsection was filed by the estate. (45 Statutes at Large 819; 45 Statutes at Large 879, Sec. 702.)

Petitioner here duly filed such written election and therefore is not bound by this subsection. Subsection (b) of this Section 702 declares that where Subsection (a) does not govern the basis for such gain or loss "shall be such basis as is in accordance with the law properly applicable thereto without any regard to the provisions of this Act." This, then, puts the petitioner back in the position of being bound by the law as set forth in the Statutes of 1921 and 1924, *supra,* and leaves to the court the question of deciding what the law actually is.

On March 3, 1930, the Court of Claims in the case of *Elmhirst* v. *United States,* 38 Federal Reporter (2d ser.),

page 915 (petition for writ of certiorari denied, 282 U. S. 851), reaffirmed its decision in the *McKinney* case, *supra*, and distinguished the *Nichols* case, *supra*, and again held that the proper basis was the cost to the testator (or the March 1, 1913, value). The court again bases its decision upon its former interpretation of the statute and held that the plain theory of Section 202—corresponding to Section 204 in the later Acts—and the purpose in the mind of Congress was to fix definitely the basis for estimating "actual profits" as distinguished from "fabricated" or "invented" profits. That the word "acquired" in the statute referred to the purchaser or owner, and that an executor does not acquire property in the sense of purchasing it—that it passes to him by operation of law; that the statute having specifically provided that where the purchase was prior to March 1, 1913, the basis was the market value as of March 1, 1913, and where the purchase was made prior thereto, it could not possibly be the market value at any other time and certainly not the value at the date of the death of the testator; that to make the value as of the death of the testator would be a plain alteration and change in the statute and its declared purposes, a palpable ignorement of its language and meaning. The court further declares:

> "'The conclusion, therefore, is unescapable that in dealing with property purchased on or after March 1, 1913 (paragraph (2) of Section 202), Congress intended the same principle and rule of entity to apply when it fixed the 'basis' as the 'cost thereof' when 'acquired' and meant 'cost' at the time when 'acquired' by the testator and not cost on or after his death. Any other construction does as much violence to the conceded purpose of the statute as it would to apply it to paragraph (1), Section 202, and to make the basis of value of a purchase prior to March 1, 1913, the value at the death of the testator. To hold other-

wise is to amend the statute and graft something on it that was not put there by Congress."

The Court of Claims again re-affirmed the same rule in the case of *Myers* v. *United States*, 51 Federal Reporter (2d ser.), page 45, and re-affirmed the doctrine in *McCann* v. *United States*, 48 Federal Reporter (2d ser.), page 446, and in the latter case distinguished between a gain to the estate of the heir of the decedent and a gain to the estate of the decedent, and held that the value at the date of the death of the decedent was the basis of value for determining gain or loss to the estate of the heir of the decedent.

We have then the unbroken line of decisions of the Court of Claims interpreting the statute as meaning "actual profits" based on the "actual gain or loss" between the purchase and the selling price, as distinguished from "fabricated or invented profits" based upon the appraised value at the death of the testator. For the second time the Court of Claims again bases this doctrine of actual profits as distinguished from fabricated profits, upon the decisions of this Court in the three cases already relied upon by it in the *McKinney* case.

The Court of Claims also points out that Congress in this 1918 Statute—and it is carried forward in the Statutes of 1921 and 1924 here in question—did, in a certain class of cases, depart from "cost" basis and provided the "inventory" value basis as a substitute basis for the "cost" basis, which the court declares indicated, in that particular, and in that particular only, was an exception to be made as to cost as a basis, and with that exception that cost was to be the basis; that had Congress so intended, while it was making this exception in the case of a trade or business for an inventory basis, it could have provided in the sale by the purchaser's executor, after the death of the purchaser, the basis should be not "cost" to the purchaser but the differ-

ence between the sale price and the value of said property at the time of purchaser's death; but Congress not having done this, the court could not read into the statute something which was not there.

With these decisions of the Court of Claims, the Circuit Court of Appeals for the Eighth Circuit, in the case at bar, differs, and it is because of this contrary holding of these two courts that the petitioner herein bases his claim to a writ of certiorari to review the decision of the Circuit Court of Appeals. Petitioner contends that it is not equitable, nor just, nor a proper carrying out of the income tax laws of the Federal Government to have a different basis of estimating gains and losses for different taxpayers, nor is it seemly to have one taxpayer held for gains or denied losses, under the same statute, while another taxpayer similarly situated has been released from tax upon gains or allowed his losses, because of different interpretations of the same statute by different courts.

The Circuit Court of Appeals of the Eighth Circuit in its opinion herein, after referring to the differing decision of the Court of Claims, Federal District Court, and the Board of Tax Appeals, declares that the question is "far from being free of doubt" but that the predominance is in favor of construing the intent of Congress to be that the basis should be value at death of the decedent rather than "acquisition value" of decedent. In reaching this conclusion as to the predominance of the two opposing lines of decisions the Circuit Court of Appeals was constrained to so hold by the language used by this Court in the case of *Brewster* v. *Gage*, 280 U. S., page 327.

The language used by this Court (pages 335 and 336 of the opinion) is as follows:

> "The Revenue Act of 1918 and subsequent Acts taxed incomes of estates during the period of the administration including profits on sales of property, and

such gains are calculated on value at date of decedent's death. There appears to be no reason why gains or losses to the estate should be calculated on one basis and those to the residuary legatees on another."

The Circuit Court of Appeals refused to accept the petitioner's contention that this language was merely *obiter* and used by way of argument and upon a different proposition than is here involved, that that case involved the basis for gain or loss from a sale by the heir and not by the executor and that the difference between the profit to the estate and profit to the heir or estate of the heir, had been clearly pointed out by the Court of Claims in the *McCann* case above cited. The Circuit Court of Appeals conceded that the controversy there was whether acquisition by the heir for the purpose of tax purposes was the date of death of the testator or the date of distribution to a legatee, but held that while the question there was different from that involved here, the language used by the court was the expression of its reason for its decision; and that the language used by this Court was not lightly used and may not lightly be put aside.

Petitioner respectfully contends that too much importance was attached by the Circuit Court of Appeals to the language used by this Court in the *Brewster* v. *Gage* case. In attempting to interpret the opinion of this Court in that case we most respectfully submit that the question of the statutory basis for determining gain or loss in a sale by an executor was not involved. The briefs submitted therein show that that question was not even argued. The 1921 Act there interpreted specifically provided that "property acquired by bequest, devise or inheritance the basis shall be the fair market price or value of said property at the time of such acquisition" and the only question involved was whether the time of such acquisition was the date of the death of the testator or the date of the decree of dis-

tribution. We submit that the language used by the Honorable Associate Justice must be taken in connection with the point there involved.

The decision in *Brewster* v. *Gage* was handed down in January, 1930, while the decision of the Court of Claims in the *Elmhirst* case, re-affirming the rule of cost to the decedent, was handed down in the following March, showing that the Court of Claims did not consider the decision of this Court in *Brewster* v. *Gage* as deciding the question of the proper basis of determining gains or losses by an executor.

In the petition for writ of certiorari in the *Elmhirst* case it was specifically urged by the Government in justification of the petition that the point there in issue had been decided adversely by this Court in the *Brewster* v. *Gage* case.

Petitioner urged upon the Circuit Court of Appeals, and now respectfully contends, that the denial by this Court of the writ in that case showed that this Court did not consider the later decision of the Court of Claims inconsistent with the decision of this Court in the *Brewster* case.

The only other case cited with approval by the Circuit Court of Appeals herein, other than the decisions of the Board of Tax Appeals—*Bankers Trust Company* v. *Bowers*, 23 F. (2d), page 941, was put forward by the Government in the petition for writ of certiorari in the *Nichols* case, and was again put forward, together with the approving though not similar case of *Eldridge* v. *United States*, 31 F. (2d), page 924, in support of the petition in the *Elmhirst* case, but both petitions for the writ were denied by this Court.

Petitioner has adopted as his own the interpretations put upon this Act of Congress by the Court of Claims fixing acquisition cost as the true basis for determining gains or losses on sale by executor, as the reasoning therein is so

concise, discerning and comprehensive that nothing can be added to it by re-statement. However, if the United States Circuit Court of Appeals for the Eighth Circuit is correct in its conclusion as to the effect of the language used by this Court in the *Brewster* v. *Gage* case then petitioner must concede that the decision of the Circuit Court of Appeals rather than the Court of Claims is the correct interpretation of the Act of Congress. Petitioner contends that the Circuit Court of Appeals has read into the decision of this Court more than was intended by the Honorable Associate Justice in the language there used.

The distinction between a sale by an heir or legatee and a sale by an executor, it seems to us, is important. The statute governing the former specifically provides that the basis for the sale by the heir or legatee is his acquisition value while the statute applicable to an executor uses the general expression, cost or March 1, 1913, value. Again the sale by an heir or legatee is voluntary, while the sale by an executor is almost always involuntary, forced by the compelling need of raising funds to pay the debts of the estate of decedent. The executor has no choice but to sell the assets and to pay the debts, and he often has little choice even as to the time of sale. Could it have been the intention of Congress to impose such a hardship on the estate of a decedent?

This Court in the cases above cited has held that it was not the intention of Congress to impose a tax upon a living taxpayer when the selling price was greater than the March 1, 1913, value, but not greater than the acquisition cost although the language of the statute taken literally might, and did in the belief of the Treasury Department, justify such a levy. This Court went behind the literal wording of the statute and applied the equitable rule of "actual gains" and that there could be no actual gain

where there was no excess in the selling price over the acquisition cost though the former was greater than the March 1, 1913, value. Why should Congress intend a harsher rule for a dead man than for a living taxpayer?

The literal interpretation of the 1921 and 1924 Acts of Congress as well as the 1918 Act do not require such interpretation even to meet the literal wording of the statute for the statute is most general in terms and merely makes an estate a taxpayer and subject to an income tax the same as a living person, but the only language used is cost or March 1, 1913, value, and the Honorable Circuit Court of Appeals read into the statute the concept that cost to the executor—namely, the appraised value at the date of death of the decedent—is what Congress intended. This theory of cost to the executor being the appraised value at the date of death of the decedent is interpretive rather than statutory, for, in fact, there can be no cost to the executor and the whole theory results in separating the decedent and the executor in a way that is incompatible with their relationship, for the executor is merely the representative of the decedent to pay the debts and turn over the residue to the heirs and legatees.

Petitioner contends that the interpretation put upon this Act of Congress by the Honorable Circuit Court of Appeals is not only inequitable and impractical but it is a reading into the statute of something that is not there, for it amounts to assessing the estate of decedent with a taxable gain when, as a matter of fact, no gain whatsoever resulted to the estate, or, in the language of the Court of Claims in the *Elmhurst* case:

> "To make the value as of the death of the testator would be a plain alteration and a change in the statute and its declared purposes."

Conclusion.

For the reasons above stated it is respectfully submitted that the writ of certiorari should be granted.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 602

CAVOUR HARTLEY, EXECUTOR OF THE ESTATE OF G. G. HARTLEY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

BRIEF ON BEHALF OF PETITIONER.

This case comes before the Court on a writ of certiorari issued to the United States Circuit Court of Appeals for the Eighth Circuit, in accordance with the order entered February 4, 1935 (R. 129), granting the petition that had been filed on December 27, 1934.

The case involves the basis for determining gains or losses from sales of property made by the executor of an estate and depletion or depreciation of such properties. The facts were stipulated before the Board of Tax Appeals and the question was presented to the Board as a question of law whether the true basis of figuring such gains and losses was the "acquisition value to the testa-

tor" as claimed by the executor or the "value at the death of the testator" as claimed by the Commissioner. The Board of Tax Appeals held in favor of the rule of value at the death of the testator and the United States Circuit Court of Appeals for the Eighth Circuit sustained the Board of Tax Appeals. As established by the decisions of the courts, this rule is known as the "old basis", while the rule of "acquisition value" is known as the "new basis".

Statement of Facts.

The testator died January 11, 1922. The petitioner taxpayer is the executor of his estate. The deductions involved were for the year 1923 brought forward to 1924 and for the year 1925 and the returns were therefore made under and the taxes governed by the Revenue Acts of 1921 and 1924. The stipulation of facts and the submission of the question as one of law makes further statement of the facts unnecessary here.

The Issue Involved.

The sole issue presented is whether in estimating gains and losses on sales by an executor or in figuring depletion and depreciation is the true basis, the acquisition value to the testator, or the value at the death of the testator within the meaning of the Revenue Acts of 1921 and 1924.

Statutes Involved and Brought in Question.

Revenue Act of 1918, Section 202 (a) (40 Stat. 1065):

> "That for the purpose of ascertaining the gain derived or loss sustained from the sale or other disposition of property, real, personal, or mixed, the basis shall be—

(1) In the case of property acquired before March 1, 1913, the fair market price or value of such property as of that date; and

(2) In the case of property acquired on or after that date (a) the cost thereof; or (b) the inventory value if the inventory is made in accordance with section 203."

Revenue Act of 1921, Section 202 (42 Statutes at Large 227):

"Sec. 202. ~~(a)~~ That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal, or mixed, acquired after February 28, 1913, shall be the cost of such property; * * *

"(b) The basis for ascertaining the gain derived or loss sustained from the sale or other disposition of property, real, personal, or mixed, acquired before March 1, 1913, shall be the same as that provided by subdivision (a);

(1) If its fair market price or value as of March 1, 1913, is in excess of such basis, the gain to be included in the gross income shall be the excess of the amount realized therefor over such fair market price or value;

(2) If its fair market price or value as of March 1, 1913, is lower than such basis, the deductible loss is the excess of the fair market price or value as of March 1, 1913, over the amount realized therefor; and

(3) If the amount realized therefor is more than such basis but not more than its fair market price or value as of March 1, 1913, or less than such basis but not less than such fair market price or value, no gain shall be included in and no loss deducted from the gross income."

Revenue Act of 1924, Section 204 (a) (b) (43 Statutes at Large 258). This 1924 Act does not differ materially from that of 1921 upon this proposition.

The Act of 1924, Section 204, sub-division (c), also fixed the basis for depletion and depreciation the same as provided in (a) or (b) for gain or loss from sales.

The Acts of 1921 and 1924 both specifically provide for taxation of the income of an estate during administration (42 Stat. 246, Sec. 219; 43 Stat. 275, Sec. 219); both include profits from sale of property by the taxpayer in taxable income (42 Stat. 237, Sec. 213; 43 Stat. 256, Sec. 203).

Synopsis of Argument.

I.

The correct basis in determining gains and profits is acquisition cost to the testator.

II.

The judicial history supports this construction.

III.

The departmental construction has followed the judicial decisions and is not entitled to weight.

IV.

The decision below is not sound or in accordance with the weight of authority and is based on fabricated, as distinguished from actual, gains and losses.

ARGUMENT.

The true basis of estimating gains and losses from sales of property by the executor or depletion and depreciation is the acquisition value to the testator and not the value at the death of the deceased.

The courts passing upon this question have differed as to the proper basis for estimating these gains and losses. The

Court of Claims in three decisions has held directly in favor of the rule of acquisition value to the testator.

McKinney v. *United States*, 62 Court of Claims 180 (Certiorari denied, 273 U. S. 716).

Elmhirst v. *United States*, 38 F. (2d) 915 (Certiorari denied 282 U. S. 851).

Myers v. *United States*, 51 F. (2d) 145.

The doctrine was again reaffirmed by the same court in *McCann* v. *United States*, 48 F. (2d) 446.

The Court of Claims in the *Elmhirst* case cited above attached importance to the denial by this Court of the writ of certiorari in the *McKinney* case, as well as in the dissimilar *Nichols* case (*Nichols* v. *United States*, 64 Court of Claims 241. Certiorari denied 277 U. S. 584), as indicating that this Court found no question worthy of review.

Opposed to this line of cases was the decision of a District Court in the Southern District of New York, in the case of *Bankers Trust Company* v. *Bowers*, 23 F. (2d) 941; the decisions, usually with the minority dissenting—as here—of the Board of Tax Appeals and the decision here sought to be reviewed of the Circuit Court of Appeals of the Eighth Circuit. The Circuit Court of Appeals, Eighth Circuit, in the decision involved herein, after discussing the varying decisions, frankly states that "The matter is far from being free from doubt. It seems to us, however, that the predominance is in favor of construing the intent of Congress to be that the basis should be value at death of the decedent." (R. 116-117.)

The Honorable Circuit Court of Appeals in its decision attaches great importance to the expression of this Court in *Brewster* v. *Gage*, 280 U. S. 327, to the effect that in figuring profits upon estates "such gains are calculated in value at date of decedent's death" and rejected petitioner's contention that this statement was *obiter* and merely by way of

argument and while that court recognized that the question involved in the *Brewster* case was different from that here, Mr. Justice Stone declares: "This language was not lightly used and it may not be lightly put aside. Though not spoken as to the matter now before us, we would hesitate to regard it other than as on the very edge of controlling authority." (R. 116). The Board of Tax Appeals in its decision treats the *Brewster* case as decisive (R. 24).

We have then the Honorable Court of Claims profoundly impressed in its later—though not its first—decision in favor of the "new basis" rule, by the denial of writ of certiorari by this Court. While over against this we have the Honorable Circuit Court of Appeals of the Eighth Circuit likewise profoundly impressed by the language used by way of argument by this Court in the *Brewster* v. *Gage*, case.

We have in the repeated decisions of the Court of Claims a strong assertion of that court's certainty as to the correctness of the conclusion arrived at by the court, while we have in the Circuit Court of Appeals the expression of uncertainty but its conclusion that the *predominance* is in favor of the rule of the "old basis" of—value at the death of the testator.

The history of the statute and the interpretation thereof by the courts have been marked by uncertainty and differences. These questions mostly arose in connection with the Revenue Act of 1918, Section 202 (a), 40 Statutes at Large 1065, but the subsequent Revenue Acts of 1921 and 1924 did not materially change the statute in its application to the issue here involved.

This difference and uncertainty is evidenced by the regulations of the Department itself. In the earlier regulations the Department adopted the basis of "value at the date of death of the testator." Article 343, Regulations 65 and 69,

Article 343, Regulations 45 and 62. After the decision of the Court of Claims in the *McKinney* case, *supra*, the Department changed its regulations, making the basis the acquisition value to decedent (or March 1, 1913, value), Treasury Department 4011, 4012 and 4010, XI-1 Cumulative Bulletin 77, 248 and 249. Again upon the coming down of the decision of the Court of Claims in the *Nichols* case, *supra*, the Department, construing the *Nichols* case as overruling the *McKinney* case, changed back to its former basis of value at the death of the testator. Treasury Department 4177, VII-2 Cumulative Bulletin 134. Later the Court of Claims in the *Elmhirst* case emphatically pointed out that it had not overruled the *McKinney* case in the *Nichols* case and with equal emphasis pointed out the vital differences between the two cases. Had the Commissioner not misinterpreted the decision of the Court of Claims in the *Nichols* case and erroneously held that it overruled the *McKinney* case, this case and much of the subsequent litigation would never have been heard of, for the rule had supposedly been settled by the decision of the Court of Claims in the *McKinney* case and by the denial of the writ of certiorari by this Court. The majority (five to four) of the Board of Tax Appeals likewise declined to be bound by the doctrine of the *McKinney* case as laid down by the Court of Claims and adhered to the rule of the value at the death of the testator. The Honorable Federal District Judge in the *Bowers* case, *supra*, likewise was persuaded to refuse to follow the decision of the Court of Claims in the *McKinney* case because he was unable to reconcile the *Nichols* case with that case and believed that the effect of the later case was to overrule the earlier one. This decision of the Honorable District Judge was a year and a half before the Court of Claims had emphatically reasserted the doctrine of the *McKinney* case in the late *Elmhirst* case and differentiated

very fully between the facts, the statute, and the question involved, in the *Nichols* and *McKinney* cases.

The underlying bases for the decisions of the Court of Claims are (a) the idea of "real" "actual" profits as distinguished from "fabricated" or "invented" profits (these very apposite words are the court's, not ours), (b) the identity of the executor with the testator based on the fundamental concept of the common law that the executor is the representative of the deceased—to close the estate, pay the debts, sell the property, if necessary, to pay the debts and to turn over the residue to the heirs.

This theory of "actual profits" as distinguished from technical or invented profits had its genesis in the reasoning of this Court in the *Goodrich, Walsh* and *Flannery* cases, more particularly the *Goodrich* case. See *Goodrich* v. *Edwards,* 255 U. S. 527, 41 S. Ct. 390, 391, 65 L. Ed. 758, and *Walsh* v. *Brewster,* 255 U. S. 536, 41 S. Ct. 392, 65 L. Ed. 762, and *United States* v. *Flannery,* 268 U. S. 98, 101, 45 S. Ct. 420, 69 L. Ed. 865.

These cases emphasise the proposition that in spite of the literal wording of the Revenue Statute fixing the March 1, 1913, value as the basis for figuring gains and losses where the purchase was prior to that date—and the actual cost if purchased after that date—that there must in reality be an *actual* gain, an increase of the selling price, not merely over the March 1, 1913, value but over the prior actual cost; that therefore the statute was not to be read literally and so impose a tax where no actual gain existed even though the selling price be greater than the March 1, 1913, value.

The Honorable Commissioner of Internal Revenue in this *Goodrich* case had ruled that the Act of Congress fixing the March 1, 1913, value as the basis, where property was purchased prior to that date, had capitalized the assets of the taxpayer at their value as it existed on that date and

that the value as of that date must control and that the difference between that value and the higher selling value was income when the sale was made.

The Honorable Solicitor General of the United States, looking deeper into the question, saw that this construction violated the very underlying theory of an income tax as authorized by the 16th Amendment and as defined by this Court in the *Eisner* case (*Eisner* v. *Macomber*, 252 U. S. 189, 64 L. Ed. 521). There Mr. Justice Pitney, in defining income, pointed out that the 16th Amendment must be construed in connection with the tax clauses of the original Constitution and that a proper regard for its genesis, as well as its very clear language, requires that this amendment shall not be extended by loose construction. That the constitutional limitations still have an appropriate and important function and are not to be overridden by Congress or disregarded by the courts. The Honorable Associate Justice adopted the definition of income as already laid down by the court with an additional elucidation of his own, making the definition read as follows:

> "Income may be defined as the gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets, to which it was applied in the Doyle case (pp. 183, 185)."

Again he continues:

> "Here we have the essential matter: not a gain accruing to capital, not a growth or increment of value in the investment; but a gain, a profit, something of exchangeable value proceeding from the property, severed from the capital, however invested or employed, and coming in, being 'derived,' that is, received or drawn by the recipient (the taxpayer) for his separate use, benefit, and disposal; that is income derived from property. Nothing else answers the description."

With this careful surveying out of the field of income by this Court before him, the Honorable Solicitor General quickly discerned that the rule of the Honorable Commissioner or even the Act of Congress itself, if given the Commissioner's interpretation, would operate to levy a tax upon income that had no substance, no reality, no actuality to it, and he frankly admitted in his brief to this Court that if such construction were adopted "a serious constitutional question arises". "Whatever gains are made by selling property resulted from three acts—acquisition, holding, and selling. These three acts together resulted in a gain or a loss, according as the selling price is more or less than the acquisition price. It is said, therefore, that unless the entire transaction composed of the three acts mentioned results in a gain there is, in fact, no income." See page 59 of Respondent's brief in *Goodrich* v. *United States.*

The Honorable Solicitor General went further and explained the reason for such conclusion and why he thought the Honorable Commissioner has erroneously construed the statute. He said "it (the statute) clearly emphasises the tax only on *gains* (italics his) arising from the sale of property." "It can not be said that there has been a gain resulting from a sale of propery at less than its cost." "From the beginning the income tax acts had imposed a tax only upon *gains* derived from sale."

Here we see developed by the Honorable Solicitor General and approved by this Court the theory and doctrine of reality and genuineness in gains and losses, something real, tangible and not something fanciful, invented, fabricated or fixed by fiat of the Commissioner or even of Congress itself.

The Honorable Court of Claims in both the *McKinney* and *Elmhirst* cases relied upon this doctrine of actual gain and loss as distinguished from technical or fictitious gains

or losses and cites the *Goodrich, Walsh* and *Flannery* cases, in support thereof.

In the *Elmhirst* case the court even goes further and claims that had Congress itself inserted a provision fixing the basis of value on the death of the testator that this Court would hold that merely a "limitation" which would not control as against the actual gain as shown between the purchase price and the sales price. *Elmhirst* v. *United States,* 38 F. (2d) 915, 923.

The fictitious and fabricated nature of alleged gains and losses, when we use the appraised value at date of death, finds striking illustration in both the *McKinney* and *Elmhirst* cases. In the *McKinney* case the testator had purchased the property in question for $177,130.90 prior to March 1, 1913. Its market value on that date was $187,200.00. At McKinney's death in 1918 it was appraised at $67,200.00. It was sold by the executor *for the purpose of paying debts and cost of administration* for administering the estate for the sum of $160,311.75. Thus it will readily be seen that there was no actual gain or profit or actual income. On the contrary there was a loss of some $17,000.00 between the cost and the selling price and a decrease of some $27,000.00 between the selling price and the March 1, 1913, value. Yet, in spite of this heavy actual loss—forced, it might be said by the compulsory sale of the property to pay debts and expenses of administration—the record tersely says there being no other funds available for that purpose—the Collector demanded a tax upon the difference between the selling price of $160,311.75 and the appraised value of $67,200.00, or a total tax of $34,460.25.

It is not surprising that the Honorable Court of Claims was persuaded of the artificial and fictitious nature of such a profit when a tax of over $34,000.00 was levied upon what amounted to an actual loss of $17,000.00 and that too upon

a sale in which there was no choice by the taxpayer and which was forced by the necessities of paying the debts of the estate and the expenses of administration.

The later *Elmhirst* case illustrates the same point even more vividly. In that case the original cost of the property was $2,415,248.60. The appraised value at death was $2,158,510.00. The selling price by the executor was $2,639,287.96. Thus the selling price by the executor was $224,039.36 in excess of the cost to decedent and $480,777.96 in excess of the appraised value at his death. The Commissioner assessed the tax upon this $480,777.96 and the total tax with interest so assessed was $267,033.94. In other words it was $40,000.00 over and above the entire actual gain from the sale of the property.

The imposition of such a burden upon the estate of a dead man, in one case imposing a tax of $37,000.00 upon an actual loss of $17,000.00, in the other imposing a tax of $40,000.00 in excess of the entire gain, must have shocked the conscience of the Honorable Court of Claims and almost forced upon them the conclusion that Congress could never have intended so unconscionable a result.

True, the adoption of the other basis might in some cases impose a heavy tax. Indeed, in all the cases, excepting those in the Board of Tax Appeals, adhering to the opposing rule, the holding of the Court to the rule of value at death was to relieve the taxpayer and not to favor the taxing authority.

Bankers Trust Co. v. *Bowers*, 23 F. (2d) 941.
Bingham et al. v. *Long*, 249 Mass. 79; 144 N. E. 77.

But at least in such cases there is a real, actual, tangible gain or profit which the estate enjoys; there is an actual increase of the selling price over the cost and we submit that such a burden, even though the tax may be heavy, is not unfair or unjust and is more easily to be borne than a

tax upon a mere fictitious or fabricated profit or gain which has no tangible substance in fact.

The argument has sometimes been made that it will favor some estates to have the rule of the appraised value at death adopted as the basis while in others it would work to the contrary, but this argument overlooks the crucial point and that is of real, actual, profits, as distinguished from chance or invented profits. What the argument really proves is that by adopting the rule of value at death some estates might escape paying upon their actual profits by the fortuitous circumstances of a low appraisal value at the time of death while other estates less fortunate would be required to pay upon invented profits which had no existence in fact. In other words one estate suffers a real hardship in being heavily taxed as in the McKinney estate upon actual losses or, as in the *Elmhirst* case, being taxed a sum equal to all its profit and the sum of $40,000 in addition, while other estates by the lucky circumstance of a high appraisement at death would escape being taxed upon what was an actual increase or profit over and above the original cost. The iniquity of the rule lies in the fact that in one case you tax actual losses by calling them gains and in the other case you allow actual gains to escape taxation by calling them losses and all done through the artifice of treating the substitution of the executor as representative of the estate in place of the testator, as an acquisition by such executor of the property of the estate. The result is to substitute chance, good luck, the swings of the market or fortuitous circumstances for reality, actuality and genuineness, and thus make the payment or the escape of the tax to rest upon chance and not upon the sound and honest basis of actual gains or losses.

It is this doctrine of reality, of actual gains, of something tangible, that moved the Court first in the *McKinney* case and later in the *Elmhirst* case. The very facts in the case

graphically illustrated the necessity of such a doctrine of actual gains and not fictitious gains and the court there found its reasons in the decisions of this Court starting with the *Goodrich* case. The Court of Claims says:

> "The statute, according to the construction given it by the foregoing decisions, had for its purpose the taxation of 'gains derived from the sale' of property, based on the difference between the original investment and the sale price, and the allowance of loss sustained measured in the same way. It contemplated a purchase and a sale. It made no provision, and it is clear that it did not intend, that any value other than the market value on March 1, 1913, was to be considered. Had it intended otherwise it would have so stated.
>
> "Defendant's contention in effect asks the court to add a provision to the statute to the effect that if a sale is made after the death of the purchaser and after March 1, 1913, the measure of gain or loss for the purposes of taxation should be not the measure fixed by the statute but the difference between the appraised value of the property as of the date of the testator's death and the selling price. And if this contention were sustained, it would amount to assessing plaintiffs with a taxable gain, although there was an actual loss both as between the purchase price and sale price, and the appraised value on March 1, 1913, and the sale price. The statement of the proposition is its answer.
>
> "Defendant is also contending that the sale by the executors creates a different situation from that which would have existed had the sale been made by McKinney himself, and it in effect asks the Court to consider as the cost of the property, not the purchase price, but the appraised value of it at the time of the testator's death, as though it had cost them that amount. Of course, there was no cost to the executors. They were the personal representatives of the decedent. The stock was the same stock as it had been in the hands of the decedent, and, as stated, had he lived and sold the stock himself there would have been

no question of taxable gain. The fact that they were executors did not alter the situation."

McKinney v. *United States*, 62 Court of Claims 180.

Again in the *Elmhirst* case the court emphasizes the same thought of actual gains and losses. The court there says:

"The plain theory of section 202 and the purpose in the mind of Congress was to fix definitely the basis for estimating actual profits, as distinguished from fabricated or invented profits, and for estimating the amount of profits to be taxed, and to this end it was provided that where property was acquired prior to March 1, 1913, the basis for fixing said amount was the market value of the property acquired as of that date, and thus the following clearly appears:

First. That "acquired" referred to the purchaser or owner. An executor does not "acquire" property in the sense of the purchase of it. It passes to him by operation of law. Had the purchase in the present case been made prior to March 1, 1913, it could not be contended that the executor had acquired the property as of the date of purchase or at the time the purchaser of the testator acquired it. The only person who acquired under the facts of this case was the testator.

Second. It thus appears (section 202) that the "basis" being the market value as of March 1, 1913, where the purchase was made prior thereto it could not possibly be the market value at any other time, and certainly not the value at the death of the testator. To hold otherwise would be to amend the statute. To make the value as of the death of the testator would thus be a plain alteration and change in the statute and its declared purposes, a palpable ignorement of its language and meaning.

Third. It is plain that had the property involved in this case been purchased prior to March 1, 1913, the basis for ascertaining profits would necessarily have

been held to have been its value as of that date, as fixed by the statute, thus treating the testator and his estate as a single entity and not separate entities and clearly demonstrating that as to tax on profits from the sale of property Congress so designed and intended.

The conclusion, therefore, is unescapable that in dealing with property purchased on or after March 1, 1913 (paragraph (2) of Section 202), Congress intended the same principle and rule of entity to apply when it fixed the "basis" as the "cost thereof" when "acquired," and meant "cost" at the time when "acquired" by the testator and not cost on or after his death. Any other construction does as much violence to the conceded purpose of the statute as it would to apply it to paragraph (1), section 202, and to make the basis of value of a purchase prior to March 1, 1913, the value at the death of the testator. To hold otherwise is to amend the statute and graft something on it that was not put there by Congress."

Again the court points out that had Congress meant an appraisal value it would have said so. The court says:

"The question is: How did the section provide for the ascertainment of these profits? What was the "basis" for measuring them? In the instant case the stocks were purchased after the 1st of March, 1913. Section 202 provides that "for the purpose of ascertaining the gain derived or loss sustained from the sale" of property the basis shall be "(2) In the case of property acquired on or after that date (March 1, 1913), the cost thereof; or the inventory value, if the inventory is made in accordance with section 203."

"Inventory" here mentioned deals with a trade or business and has no bearing on this case. It has, however, significance in connection with this case in that Congress in a certain class of sales departed from "cost" basis and provided the inventory value as a substitute basis for "cost" basis, indicating that in

that particular, and that particular only, was an exception to be made as to "cost" as a "basis." With that exception "cost" was to be the "basis." It could very readily have provided, if it had intended so to do, while it was making the exception in the case of a trade or business for an inventory basis, that when the property purchased was sold by the purchaser's executor after the death of the purchaser, the "basis" should be not "cost" to the purchaser but the difference between the sale price and the value of said property at the time of purchaser's death. But it did not do this and we can not supply the omission by reading into the statute something which is not there.

As the statute stands, the "basis" provided was the difference between the "cost" and the selling price, i. e., purchase and selling price (*Walsh* v. *Brewster, supra,* page 538 of 255 U. S., 41 S. Ct. 392), whether the decedent was dead or alive. Of course, Congress knew that people die and that very often property passing to an executor is thereafter sold, and in the light of this knowledge could have provided for another basis than the one provided by this section, but this it did not do.

We hold in this case, as we held in the *McKinney* Case, that under section 202 the basis provided for ascertaining loss or gain from the sale of property is the difference between the "cost" or purchase and the selling price.

The regulations fixing the appraised value at death for estate tax as the "basis" instead of "cost," named in said section, was an attempt to add a provision to section 202 that it did not contain. It was an attempt to "graft something on the statute that was not there," *Smietanka* v. *First Trust & Savings Bank,* 257 U. S. 602, 42 S. Ct. 223, 224, 66 L. Ed. 391, something that was not within the express contemplation of the statute."

Elmhirst v. *United States,* 38 F. (2d) 915.

Nearly all the Courts adopting the opposing rule, including the Circuit Court of Appeals in the case at bar, have attached great importance to the decision of the Massachusetts Supreme Court in the case of *Bingham* v. *Long*, cited above, in which that Court under its state statute adopted the value at the death of the decedent to escape the imposition of a heavy tax upon an estate but both the Massachusetts income tax law, as well as the relationship of the executor to the estate are peculiar and the connection of the executor and the beneficiary different from that of common law in which the executor is the representative of the deceased acting as an officer of the Court to settle up the estate, pay the debts and sell such property as is necessary for paying the debts and expenses of administration.

The Massachusetts Court says:

> "Although the tax is exacted in these instances from the executor, administrator, or trustee, the person upon whom the burden of the tax fairly rests is the beneficiary, and *whether the tax shall be levied at all depends upon the residence of the beneficiary.*"

And again:

> "The mere fact that the residence of the decedent was within the commonwealth does not, under general principles of law, render his personal estate subject to taxation here, where such estate is not actually within the commonwealth, and the executor or administrator, who is its owner is a non-resident."

We submit that these two quotations show that the Massachusetts law is peculiar to itself and that undue weight has been attached to this decision by outside Courts.

The Honorable Circuit Court of Appeals was impressed with the argument that inequality would arise in relation to the inheritance tax upon estates and that the rule contended for by petitioner would result either in a double

tax or escape, partially or entirely, from taxation. The Honorable Court of Claims has already pointed out in the *Elmhirst* case the difference between the inheritance tax statute and the income tax statute and that the two relate to entirely different matters and that discussion leaves the question without necessity for extended comment here. When we consider that the inheritance tax is based upon the net estate after the payment of all debts, expenses of administration and other charges and has an additional exemption of $50,000.00, it seems to us that the argument of the Honorable Circuit Court has but slight application. There are too many factors involved. Too often the income tax would have to be paid whether there was an inheritance tax or not, as the latter is dependent upon too many factors. We have only to apply the argument of the Honorable Circuit Court to the actual facts in the *McKinney* and *Elmhirst* cases to see that its application is too uncertain, too contingent, too difficult, to anticipate and forecast, to make it of any value in interpreting the mind of Congress in passing the statute making an executor a taxpayer. And whatever might be the effect of the income and the inheritance tax operating together, we would at least be dealing with reality, with actual profits and actual losses, with actual value, actual increase and decrease in the estate.

Again the adoption of the rule of cost to the testator includes the profits and likewise the losses between the time of purchase and the date of the death of the testator and so avoids the hiatus during that time, a thing necessarily to be desired, for under the rule contended for by the Commissioner the profits from the date of purchase to the death of the testator could not be taxed, save in the exceptional case where they might or might not be reached by some inheritance tax.

In the *Brewster* v. *Gage* case one of the convincing arguments advanced by the Government to make the date of

acquisition of the heir the date of death of the testator and not the date of the final decree, was to avoid this hiatus and to reach the profits during such time.

The regulations of the Department throw no light upon the question as they have varied with the decision of the Court.

We respectfully represent to the Court that there is also a vital distinction and a vital necessity to use a different basis between a sale by heir or legatee and a sale by an executor. The executor is not the representative of the heir. Very often his position is antagonistic to the heir. He is the representative of the deceased, to see that the deceased's debts are paid, his estate conserved and properly administered and, if necessary, as in the *McKinney* case, to sell the property to pay the debts and expenses of administration, to pay the various taxes, state and Federal, and when all this is done to turn over the residue to the heir or legatee. The statute governing a sale by an heir specifically provides that the basis for the sale is acquisition value while the statute applicable to the uses, the general expression of a taxpayer, to-wit: Cost or March 1st, 1913 value. Of course, the heir acquires the property on the death of the testator. He comes into a new ownership, a new acquisition, something he never owned before and subject only to the requirements of administering the estate and there is not the same continuity as there is between an executor and the testator. The executor in the language of the Court of Claims stands in the shoes of the testator and winds up his business, pays his debts and distributes the residue. Again, the sale by an heir or legatee is voluntary. He can choose his time, place and occasion, while the sale by an executor is almost invariably involuntary under the order of the Court, forced by the compelling need of raising funds to pay the debts of the decedent. The executor has no choice but to sell the assets and pay

the debts and he often has little choice as to the time of sale.

We submit that necessity, reason, justice and the circumstances surrounding estates call for a distinction between a sale by an executor and a sale by an heir.

The Honorable Court of Claims found no difficulty in distinguishing between the sale by an heir and a sale by an executor.

See *Myers* v. *United States,* 51 F. (2d) 45.
McCann v. *United States,* 48 F. (2d) 446.

In conclusion we submit that the rule laid down by the Honorable Court of Claims, of cost to the testator, is the true basis for determining gains and losses, that it is based upon actual gains as distinguished from fabricated gains. That to interpret the Act of Congress as taxing gains which did not exist, which have no substance, which are pure figment of the law would make the Act of Congress beyond the limitations of the 16th Amendment and in violation of the Constitution of the United States as an attempt to tax as income something which was not income.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 602

CAVOUR HARTLEY, EXECUTOR OF THE ESTATE OF G. G. Hartley, petitioner

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the United States Board of Tax Appeals (R. 18–27) are reported in 27 B. T. A. 952. The opinion of the Circuit Court of Appeals (R. 113–122) is reported in 72 F. (2d) 352.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 9, 1934. (R. 123). A petition for rehearing was filed August 2, 1934 (R. 124–128), and was denied October 17, 1934 (R. 128). The petition for a writ of certiorari was filed on December 27, 1934. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the basis for determining gain or loss on the sale of properties held by the executor of an estate, and for computing depreciation and depletion on such properties, is the value of the properties at the date of the decedent's death or the cost thereof to the decedent.[1]

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra,* pp. 12–17.

STATEMENT

The petitioner is executor of the estate of G. G. Hartley, who died January 11, 1922, leaving real, personal, and mixed properties valued at approximately $3,000,000 and producing about $200,000 gross income annually. Among the properties were

[1] Three other questions involving the allowability of certain expense and loss deductions claimed were presented below, but these are not in issue here.

about fifteen iron mines operated under royalty leases and several thousand pieces of real estate consisting of farms and improved rental property. The personal property consisted of a quantity of miscellaneous investment and income securities (stocks, government and corporate bonds, notes and accounts receivable). (R. 19, 85–97.)

The petitioner duly filed his income-tax returns as executor for 1924 and 1925. In the 1924 return he reported a loss of $1,184.39, and on the 1925 return a gain of $255.05, from the sale of capital assets. Deductions were claimed for depletion of iron mines in the amount of $41,663.62 for 1924 and $67,272.81 for 1925. Deductions also were claimed in each year for depreciation of rental property in amounts not in controversy. The gain or loss on the sale of capital assets and the deductions for depletion and depreciation, as reported on the returns, were computed upon the basis of the values of the several properties at the date of the decedent's death. Upon audit of the returns the Commissioner made numerous adjustments of profits from sales and of depletion and depreciation and determined deficiencies. On July 27, 1928, the petitioner filed with the Commissioner a written election not to have the income-tax returns of the estate governed by the provisions of Section 702 (a) of the Revenue Act of 1928 (*infra*, p. 15). (R. 20.)

Before the Board of Tax Appeals the petitioner contended that the correct basis for computing the

gain or loss on sales of property, and the deductions for depletion and depreciation, was the basis which the properties had in the hands of the decedent, namely, the cost or March 1, 1913, value thereof (R. 21). The Commissioner, on the other hand, contended that the basis used in the returns (value at the date of the decedent's death) was correct. The Board of Tax Appeals sustained the Commissioner, and the court below affirmed.

ARGUMENT

The Revenue Acts of 1924 and 1926 provide that the basis for determining gain or loss on the sale of property *acquired* after February 28, 1913, shall be the cost thereof, and that in the case of property acquired before March 1, 1913, the basis shall be the cost or the value thereof on that date, whichever is greater. Section 204 (a) and (b), *infra*, pp. 12, 14. While the statutes do not specifically prescribe the basis for property of the estates of deceased persons, the regulations adopted by the Treasury Department for the proper administration of the Acts provide that the gain or loss on the sale of property by the executor of an estate shall be determined upon the basis of the value of the property at the date of the decedent's death. Article 343, Regulations 65 and 69, *infra*, pp. 16, 17. The returns filed here followed these regulations. Similar provisions were incorporated in the regulations under the Revenue Acts of 1918 and 1921 which,

like the statutes here involved, did not expressly prescribe the basis for property of decedents' estates. Article 343, Regulations 45 and 62.

We submit that the regulations correctly interpret the statutes here involved. A decedent's estate for income-tax purposes is a separate taxable entity, entirely distinct from the decedent, the tax being assessed to and paid by the executor or administrator. *Bankers' Trust Co.* v. *Bowers,* 295 Fed. 89 (C. C. A. 2d); *Catherwood* v. *United States,* 291 Fed. 560 (C. C. A. 3d); Section 2 (a) (1) (9), Revenue Acts of 1924 and 1926. See also *Anderson* v. *Wilson,* 289 U. S. 20, 27. The net income of the estate is taxable just as the net income of an individual is taxable, and is to be computed in the same manner as that of an individual. The property of a decedent immediately upon death passes to his estate. During the period of administration or settlement the estate is the entity, the taxpayer, which receives the income and is taxable thereon. The estate as an entity *acquires* the property upon the death of the decedent.

In prescribing cost as the basis of property acquired after February 28, 1913, the statutes obviously mean the cost of the property to the *taxpayer* who sells the same and whose income is to be determined. It is not to be presumed that the statutes contemplate the determination of the gain or loss on a sale of property by one taxpayer,

which is to be included in the computation of his taxable net income, upon the basis of the cost of such property to another and distinct taxpayer.

In the case of property acquired by devise, bequest, or inheritance the basis prescribed is the fair market value at the time of acquisition (Section 204 (a) (5), *infra*, p. 12), which it has been held is the date of the decedent's death and not the date of distribution to the devisee, legatee, or heir. *Brewster* v. *Gage*, 280 U. S. 327. In so holding, this Court took cognizance of the rule applied by the regulations to sales by the executor of a decedent's estate and said (pp. 335–336):

> The Revenue Act of 1918 and subsequent Acts taxed incomes of estates during the period of the administration including profits on sales of property, and such gains are calculated on value at date of decedent's death. There appears to be no reason why gains or losses to the estate should be calculated on one basis and those to the residuary legatees on another.

The Board of Tax Appeals has consistently held that the basis for determining the gain or loss on the sale of property by the estate of a decedent is the value of such property at the date of death of the decedent. *Straight, Executrix* v. *Commissioner*, 7 B. T. A. 177; *Barnes, Executor* v. *Commissioner*, 8 B. T. A. 360; *Blodget* v. *Commissioner*, 13 B. T. A. 1243; *Wolfe, Executor* v. *Commissioner*, 15 B. T. A. 835; *Central Trust Co., Executor* v.

Commissioner, 19 B. T. A. 867; *Pierce* v. *Commissioner,* 22 B. T. A. 1070; *Ayer* v. *Commissioner,* 26 B. T. A. 9.

The District Court for the Southern District of New York, in a well reasoned opinion, has taken the same view and, construing the provisions of the Revenue Act of 1926, here involved, held that the basis for determining the gain or loss on the sale of property by the executor of a decedent's estate is the value of the property at the date of decedent's death. *Bankers' Trust Co.* v. *Bowers,* 23 F. (2d) 941. The Circuit Court of Appeals for the Sixth Circuit has held likewise. *Eldredge* v. *United States,* 31 F. (2d) 924, 930.

The Court of Claims alone has taken the contrary view. *McKinney* v. *United States,* 62 C. Cls. 180, certiorari denied, 273 U. S. 716; *Elmhirst* v. *United States,* 69 C. Cls. 295, certiorari denied, 282 U. S. 851; *Myers* v. *United States,* 72 C. Cls. 214. The last two cases were decided on the authority of the first.[2] The basis of the decision in the *McKinney* case, which involved the Revenue Act of 1918, was that since the statute fixed cost as the basis of the property and there is no cost to the executor of a decedent's estate, who is the personal representative of the decedent, the cost

[2] In the *Myers* case, *supra,* two out of the five judges sitting concurred in the result solely on the ground that the same question had been decided by the court in two earlier cases, one of the two stating in a carefully reasoned opinion his personal disagreement with the views of the majority.

to the decedent must be used as the basis, the court saying (p. 188):

> The stock was the same stock as it had been in the hands of the decedent; and, as stated, had he lived and sold the stock himself there would have been no question of taxable gain. The fact that they were executors did not alter the situation.

The view taken by the Court of Claims, we submit, is unsound and cannot be supported. The court placed undue emphasis upon the word "cost" used in the statute and the representative capacity in which an executor acts, and failed to give proper effect to related provisions of the statute. This Court has held that the provision of the statute making cost or March 1, 1913, value the basis does not exclude the use of market value when there was literally no cost to the taxpayer at the date as of which basis is taken. *Heiner* v. *Tindle,* 276 U. S. 582, 585–586. When Congress intended that cost to some one other than the taxpayer should be the basis, as in the case of property acquired by gift, it expressly so provided. See Section 202 (a) (2) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 229. Moreover, as was pointed out in the opinion in *Bankers' Trust Co.* v. *Bowers,* 23 F. (2d) 941, *supra,* 943, the rule that market value at the time of acquisition shall be the basis in the case of property acquired by bequest, devise, or inheritance furnishes a guide to the intent of Congress in respect of the present question, for there

is no logical reason for distinguishing between property in the hands of an executor and property in the hands of a legatee or heir. See also *Brewster* v. *Gage,* 280 U. S. 327, 335–336, *supra.* Manifestly, the rule advocated by the Commissioner will not always work a hardship upon the estate, as the petitioner suggests. (Br. 18.) For although in some instances it will increase the tax, in others it will make it less. See *Bankers' Trust Co.* v. *Bowers, supra.*

Except for the brief period from April 6, 1927, to July 7, 1928, during which an amendment to the regulations recognized cost to the decedent as the basis (T. D. 4011, VI–1 Cumulative Bulletin, p. 77), the regulations of the Treasury Department uniformly have provided that value at the date of the decedent's death is the proper basis for property of the estate, and it is to be noted that the amendment referred to was prompted solely by the decision in the *McKinney* case, *supra.* The consistent departmental interpretation of the statutes and uniform practice of the Department for many years before the temporary change prompted by the decision of the Court of Claims is entitled to great weight, and the repeated reenactment of the pertinent provisions in successive Revenue Acts gives to the regulations "the force of law." *Old Mission Portland Cement Co.* v. *Helvering,* decided December 3, 1934, No. 107. It should also be noted that the Revenue Act of 1928, Section 113 (a) (5) (*infra,* p. 14),

the first statute to prescribe in specific terms the basis for property of a decedent's estate, provides that the basis shall be the value at the date of decedent's death. Section 702 (a) of the Revenue Act of 1928 (*infra*, p. 15), which authorized the closing of returns for earlier years if filed on the basis of regulations then in force or on the basis of value at the date of decedent's death, is not applicable here, for the taxpayer elected in writing not to have those provisions applied and in such cases Section 702 (b) provided that the gain or loss of the estate should be computed in accordance with the law properly applicable without regard to that section.

We think that the decision of this Court in *Brewster* v. *Gage, supra,* established that the basis for gain or loss on the sale of property by a decedent's estate is the value of the property at the date of decedent's death. The decisions of the Board of Tax Appeals and the courts, except the Court of Claims, are in accord. The departmental regulations so provide. The Revenue Act of 1928 expressly provides such basis, so that the question cannot arise for any year subsequent to 1927.

Under the statutes the basis for computing depreciation and depletion on property is the same as the basis for determining the gain or loss on the sale of property. Section 204 (c), Revenue Acts of 1924 and 1926, *infra*, pp. 13, 14. Since the correct basis for determining gain or loss on the sale of

property of a decedent's estate is the value thereof at the date of the decedent's death, it follows that the basis for computing depreciation and depletion on the property of the estate is the value of the property at the date of decedent's death.

CONCLUSION

The decision below is correct and is in accord with the decisions of this Court, the Board of Tax Appeals, and all other courts which have had occasion to pass upon the question, except the Court of Claims. The question presented is one solely of construction of statutes prior to the Revenue Act of 1928 and is definitely set at rest by the latter statute. It is not thought that the question is of sufficient importance to warrant review by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1935.

APPENDIX

STATUTES AND REGULATIONS INVOLVED

Revenue Act of 1924, c. 234, 43 Stat. 253:

> SEC. 204. (a) The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—
>
> * * * * *
>
> (5) If the property was acquired by bequest, devise, or inheritance, the basis shall be the fair market value of such property at the time of such acquisition. The provisions of this paragraph shall apply to the acquisition of such property interests as are specified in subdivision (c) or (e) of section 402 of the Revenue Act of 1921, or in subdivision (c), (d), or (f) of section 302 of this Act;
>
> * * * * *
>
> (b) The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, shall be (A) the cost of such property (or, in the case of such property as is described in paragraph (1), (4), or (5), of subdivision (a), the basis as therein provided), or (B) the fair market value of such property as of March 1, 1913, whichever is greater. In determining the fair market value of stock in a corporation as of March 1, 1913, due re-

gard shall be given to the fair market value of the assets of the corporation as of that date.

(c) The basis upon which depletion, exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the same as is provided in subdivision (a) or (b) for the purpose of determining the gain or loss upon the sale or other disposition of such property, * * * (U. S. C., Title 26, Sec. 935).

SEC. 212. (a) In the case of an individual the term "net income" means the gross income as defined in section 213, less the deductions allowed by sections 214 and 206.

(b) The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. * * * (U. S. C., Title 26, Sec. 953).

SEC. 219. (a) The tax imposed by Parts I and II of this title shall apply to the income of estates or of any kind of property held in trust, including—

* * * * *

(3) Income received by estates of deceased persons during the period of administration or settlement of the estate; and

* * * * *

(b) Except as otherwise provided in subdivisions (g) and (h), the tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that—

* * * * *

(U. S. C., Title 26, Sec. 960).

Sections 204 (a) (5), (b), and (c), and 212 (a), (b), and 219 (a) (3) and (b), of the Revenue Act of 1926, c. 27, 44 Stat. 9 (U. S. C. App., Title 26, Secs. 935, 953, and 960), so far as material, are identical with the corresponding provisions of the Revenue Act of 1924, set forth above.

Revenue Act of 1928, c. 852, 45 Stat. 791, 818, 879:

SEC. 113. BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Property acquired after February 28, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * *

(5) *Property transmitted at death.*—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall

be the fair market value of the property at the time of the distribution to the taxpayer. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death;

* * * * *

SEC. 702. BASIS OF PROPERTY UPON SALE BY ESTATE—RETROACTIVE.

(a) If in the return of any decedent's estate for any taxable year preceding the taxable year 1928, the basis, upon which gain or loss realized upon the sale or other disposition of property acquired by the estate from the decedent was computed, was the value of the property at the time of the death of the decedent or was in accordance with the regulations in force at the time such return was filed, then the computation of such gain or loss shall be made upon such basis, unless claim for refund or credit in respect of such basis, or a written election not to come within the provisions of this subsection, has been filed by the estate before the expiration of the period of limitation for filing claims.

(b) In every other case the computation of the gain or loss realized by an estate in any taxable year preceding the taxable year 1928 from the sale or other disposition by it of property acquired by the estate from the decedent, shall be made on such basis as is

in accordance with the law properly applicable thereto, without regard to any provision of this Act.

Treasury Regulations 65, promulgated under the Revenue Act of 1924:

> ART. 343. *Decedent's estate during administration.*—The "period of administration or settlement of the estate" is the period required by the executor or administrator to perform the ordinary duties pertaining to administration, in particular the collection of assets and the payment of debts and legacies. It is the time actually required for this purpose, whether longer or shorter than the period specified in the local statute for the settlement of estates. Where an executor, who is also named as trustee, fails to obtain his discharge as executor, the period of administration continues up to the time when the duties of administration are complete and he actually assumes his duties as trustee, whether pursuant to an order of the court or not. No taxable income is realized from the passage of property to the executor or administrator on the death of the decedent, even though it may have appreciated in value since the decedent acquired it. In the event of delivery of property in kind to a legatee or distributee, no income is realized. Where, however, the executor sells property of the estate for more than its value at the death of the decedent, the excess is income, or may be capital gain, taxable to the estate. See article 1594. * * *

Article 343 of Treasury Regulations 69, so far as material, is substantially identical with Article 343 of Regulations 65, set forth above.

Treasury Regulations 74, promulgated under the Revenue Act of 1928:

> ART. 596. *Property transmitted at death.*—In the following cases the basis for determining gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the fair market value of the property at the time of the death of the decedent:
>
> * * * * *
>
> (3) Property, whether real or personal, in the hands of a decedent's estate, acquired by the estate from the decedent (see article 863).
>
> * * * * *

Article 863 of Regulations 74 is substantially identical with Article 343 of Regulations 65 and 69, *supra*.

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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 602

CAVOUR HARTLEY, EXECUTOR OF THE ESTATE OF G. G. Hartley, petitioner

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The findings of fact and opinion of the United States Board of Tax Appeals (R. 18–27) are reported in 27 B. T. A. 952. The opinion of the Circuit Court of Appeals (R. 113–122) is reported in 72 F. (2d) 352.

JURISDICTION

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Certiorari was granted February 4, 1935. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the basis for determining gain or loss on the sale of properties held by the executor of an estate, and for computing depreciation and depletion on such properties, is the value of the properties at the date of the decedent's death or the cost thereof to the decedent.[1]

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The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 30–38.

STATEMENT

The petitioner is executor of the estate of G. G. Hartley, who died January 11, 1922, leaving real, personal, and mixed properties valued at approximately $3,000,000 and producing about $200,000 gross income annually. Among the properties were about fifteen iron mines operated under royalty leases and several thousand pieces of real estate consisting of farms and improved rental property. The personal property consisted of a quantity of miscellaneous investment and income securities (stocks, government and corporate bonds, notes, and accounts receivable). (R. 19, 85–96.)

[1] Three other questions involving the allowability of certain expense and loss deductions claimed were presented below, but these are not in issue here.

The petitioner duly filed his income-tax returns as executor, for 1924 and 1925. In the 1924 return he reported a loss of $1,184.39, and in the 1925 return a gain of $255.05, from the sale of capital assets. Deductions were claimed for depletion of iron mines in the amount of $41,663.62 for 1924 and $67,272.81 for 1925. Deductions also were claimed in each year for depreciation of rental property in amounts not in controversy. The gain or loss on the sale of capital assets and the deductions for depletion and depreciation, as reported on the returns, were computed upon the basis of the values of the several properties at the date of the decedent's death. Upon audit of the returns the Commissioner made numerous adjustments of profits from sales and of depletion and depreciation and determined deficiencies. On July 27, 1928, the petitioner filed with the Commissioner a written election not to have the income-tax returns of the estate governed by the provisions of Section 702 (a) of the Revenue Act of 1928 (*infra*, p. 33). (R. 20.)

Before the Board of Tax Appeals the petitioner contended that the correct basis for computing the gain or loss on sales of property, and the deductions for depletion and depreciation, was the basis which the properties had in the hands of the decedent, namely, the cost or March 1, 1913 value thereof (R. 21). The Commissioner, on the other hand, contended that the basis used in the returns (value at the date of the decedent's death) was correct. The Board of Tax Appeals sustained the Commissioner, and the court below affirmed.

SUMMARY OF ARGUMENT.

The regulations have consistently provided (except for a temporary amendment) that value at date of decedent's death is the proper basis for determining gain or loss on sale of property by an executor of an estate. Congress' repeated reenactment of the pertinent provisions in successive Revenue Acts, without substantial change, gives to the regulations the force of law. The first *specific* legislation was necessitated by a conflict of the decision of the Court of Claims with other decisions and departmental regulations. The Revenue Act of 1928 confirms and provides specifically in accord with the regulations.

It is well established by decision of this Court, that value at date of decedent's death is the correct basis for determining gain or loss to a legatee; and, as this Court has stated, there is no reason why gains or losses to legatees and devisees should be calculated on one basis and those to estates on another. In fact, Congress has shown a clear intent to make the value upon which estate tax is levied as the basis in both situations.

The basis prescribed by the Treasury regulations, and adopted by the Board of Tax Appeals, the District Court for the Southern District of New York, and the Circuit Courts of Appeals for the Sixth and Eighth Circuits is grounded on the correct construction of the statutes. Furthermore, it avoids the injustice of double taxation—the imposition of both an estate tax and an income tax on the increase in value prior to decedent's death.

The basis applied by the Commissioner herein was the legal and the only fair basis.

ARGUMENT

I

THE STATUTES, AND REGULATIONS INTERPRETING THEM

The Revenue Acts prior to 1928 did not specifically prescribe the basis for determining the gain or loss from the sale of property held by an executor of an estate. However, the Treasury regulations promulgated under each of said earlier Acts provide that the gain or loss shall be determined upon the basis of the value of the property at the date of the decedent's death. (Article 343, Regulations 45, 62, 65, and 69, *infra*, pp. 34, 35.) The regulations have at all times so provided, except for a brief period (April 6, 1927, to July 7, 1928) during which an amendment thereto recognized cost to the decedent as the basis.[2]

[2] The amendment referred to (T. D. 4011, VI–1 C. B. 77.) was prompted solely by the erroneous decision of the United States Court of Claims in *McKinney* v. *United States*, 62 C. Cls. 180, certiorari denied, 273 U. S. 716.

Later, however, and after the decision of the Court of Claims in *Nichols* v. *United States*, 64 C. Cls. 241, and the decision of the District Court for the Southern District of New York in *Bankers' Trust Co.* v. *Bowers*, 23 F. (2d) 941, and the decision of the Board of Tax Appeals in *Straight* v. *Commissioner*, 7 B. T. A. 177, the Treasury Department, on July 7, 1928, revoked its amendment of April 6, 1927, and restored the original article 343 of the regulations, *supra*. (T. D. 4177, C. B. VII–2, p. 134.)

The consistent departmental interpretation of the statutes[3] and the uniform practice (except for the temporary amendment) of the Department for many years, are entitled to great weight. The repeated reenactment (in 1921, 1924, and 1926) of the pertinent provisions in successive Revenue Acts, as theretofore interpreted by the departmental regulations, gives to the regulations "the force of law." *Old Mission Portland Cement Co.* v. *Helvering*,[4] 293 U. S. 289; *Brewster* v. *Gage*,[5] 280 U. S. 327, 337. In *Eldredge* v.

[3] The following are some of the early decisions: O. D. 6, 1 C. B. 37 (1919); L. O. 1012, 2 C. B. 34 (1920); O. D. 129, 1 C. B. 175 (1919); O. D. 219, 1 C. B. 180 (1919); O. D. 560, 2 C. B. 175 (1920); O. D. 667, 3 C. B. 52 (1920); O. D. 694, 3 C. B. 53 (1920); O. D. 731, 3 C. B. 210 (1920); I. T. 1379, C. B. I–2, p. 41 (1922); I. T. 1638, C. B. II–1, p. 37 (1923); I. T. 1719, C. B. II–2, p. 45 (1923).

[4] In *Old Mission Portland Cement Co., supra*, it was stated by Mr. Justice Stone, referring to the successive and consistent Treasury regulations, as follows:

"These provisions [interpreting the 1921 Act] were retained, without substantial change, in the regulations promulgated under the 1924, 1926, and 1928 Revenue Acts. * * * As section 234 (a) (1) to which they pertain has been reenacted in several revenue acts, the regulation now has the force of law. * * *"

[5] In *Brewster* v. *Gage, supra*, this Court, referring to the regulations here in question, stated as follows:

"These regulations were prepared by the department charged with the duty of enforcing the Acts. * * * It is the settled rule that the practical interpretation of an ambiguous or doubtful statute that has been acted upon by officials charged with its administration will not be disturbed except for weighty reasons." *Logan* v. *Davis*, 233 U. S. 613, 627. *Maryland Casualty Co.* v. *United States*, 251 U. S. 342, 349. *Swendig* v. *Washington Water Power Co.*, 265 U. S. 322, 331.

United States, 31 F. (2d) 924 at 930, the Circuit Court of Appeals (6th Circuit) referred to the 1918 Act as an "unusually clear legislative sanction of the early administrative interpretation."

Congress added to the Revenue Acts of 1921 [202 (a) (3)], 1924 and 1926 [204 (a) (5)], provisions which did not appear in the Revenue Act of 1918, and which, therfore, were not considered by the Court of Claims when it decided the *McKinney* case, *supra*, involving the 1918 Act.[6] These later Acts provide that, if the property was acquired by bequest, devise, or inheritance, the basis shall be the fair market value of such property at the time of *acquisition*, and specifically apply to transfers subject to estate taxes. Thus, a clear intent is shown to designate the value upon which the estate tax has been levied, as the basis for determining gain or loss.

Where Congress intended that the basis should be other than the value on date of acquisition by the taxpayer, it expressly so provided. Subsection 202 (a) (2) of the Revenue Act of 1921 and Subsections 204 (a) (2–4) of the Revenue Acts of 1924 and 1926 provide that property acquired (after December 31, 1920) by *gift* shall retain the same basis as that which would be used by the donor. This different treatment of gifts was "to prevent evasion of taxes on capital

[6] That fact may account for the decision in the *McKinney* case.

gains." (*Helvering* v. *New York Trust Co.*, 292 U. S. 455, 462; *Taft* v. *Bowers*, 278 U. S. 470, 479, 482. See also H. Rept. No. 350, 67th Cong., 1st Sess., p. 9.)

When Congress was apprised that the decisions of the Court of Claims were in conflict with the decisions of other courts and of the Board of Tax Appeals, it specifically provided (by Section 113 (a) (5) of the Revenue Act of 1928, *infra*, pp. 32–33, under the heading "Property transmitted at death") that the basis of property "acquired by the decedent's estate from the decedent" shall be *the fair market value of the property at the time of the death of the decedent.* Thus the Act of 1928 states *specifically* what was clearly intended by the prior Acts, but which was misconstrued by the Court of Claims. (The Act of 1928 was the first Act enacted after the departmental regulations, prescribing as basis the value at decedent's death, had been questioned.) The new provision in the 1928 Act was intended as a clarification of the existing law, not as a change in the law. In *Helvering* v. *New York Trust Co.*, 292 U. S. 455, at 468, this Court, by Mr. Justice Butler, stated that a "mere change of language does not necessarily indicate intention to change the law. The purpose of the variation may be to clarify what was doubtful and so to safeguard against misapprehension as to existing law." That precisely was the situation at the adoption of the 1928 Act.

Section 702 of the Revenue Act of 1928 (*infra*, p. 33): By subsection (a) it was provided that if the taxpayer

had filed his return (prior to 1928) in accordance with the regulations in force at the time such return was filed, or if the basis used was the value at the date of death, the computation should stand upon the basis used, unless there was duly filed a written election not to come within the provisions of the section, in which case Section 702 (b) provides that the gain or loss shall be computed in accordance with the law properly applicable.

In effect, Congress has said that even though the wrong method was used, if it was in accord with the regulations then in force, it may stand. But even though the regulations in force were not complied with, if the right method was used, it may stand. Congress' view of the matter is clear.

The returns herein were made on the correct basis and in accordance with the regulations in force at the time. Hence, the election filed by this taxpayer does not change the situation in any way.

A. The Treasury regulations correctly interpret the statutes here involved

The applicable statutes [7] provide generally that the basis for determining gain or loss on the sale of property acquired after February 28, 1913, shall be the

[7] Section 202 (a) of the 1921 Act and Section 204 (a) (b) of the 1924 and 1926 Acts, *infra*, pp. 30, 31, 32 (all of which are substantially the same).

cost thereof, and that in the case of property acquired before March 1, 1913, the basis shall be the cost, or value thereof on that date, whichever is the greater.

Section 219 (a) of those Acts applies the tax to the net income received by the estates of deceased persons during the period of administration, to be paid by the fiduciary.

Thus, a decedent's estate for income-tax purposes is made a separate taxable entity, entirely distinct from the decedent, the tax being assessed to and paid by the executor or administrator. *Bankers' Trust Co.* v. *Bowers*, 295 Fed. 89 (C. C. A. 2d); *Catherwood* v. *United States*, 291 Fed. 560 (C. C. A. 3d); Section 2 (a) (1) (9), Revenue Acts of 1924 and 1926. See also *Anderson* v. *Wilson*, 289 U. S. 20, 27.

The property of a decedent immediately upon death passes to and is "acquired" by, his estate, as a separate and distinct entity. During the period of administration or settlement, the estate is the entity, the taxpayer, which receives the income and is taxable thereon. *Merchants' L. & T. Co.* v. *Smietanka*, 255 U. S. 509; *Nichols* v. *United States*, 64 C. Cls. 241, certiorari denied, 277 U. S. 584.

This principle of separate identity is therefore well established. However, it is wholly ignored in petitioner's argument.

In prescribing "cost" as the basis of property acquired after February 28, 1913, the statutes obviously mean the cost of the property to the *taxpayer*

who sells the same and whose income is to be determined. In the absence of an express provision, it is not to be presumed that the statutes contemplate the determination of the gain or loss on a sale of property by one taxpayer, which is to be included in the computation of his taxable net income, upon the basis of the cost of such property to another and distinct taxpayer.

In the case of property acquired by devise, bequest, or inheritance, the basis prescribed is the fair market value at the time of "acquisition" (Section 204 (a) (5) of the Revenue Acts of 1924 and 1926, *infra*, pp. 30, 32), which this Court has held to be the date of the decedent's death, and not the date of distribution to the devisee, legatee, or heir. *Brewster* v. *Gage*, *supra*.

Since legatees and executors, like trustees and *cestuis que trustent*, may be each taxed in the same year on separate portions of the estate's income (*Freuler* v. *Helvering*, 291 U. S. 35)—and as there is nothing in the Acts to indicate a purpose to establish two bases—it must follow that the proper basis for an executor is value at date of decedent's death.

Article 343 of Regulations 62, 65, and 69, promulgated under the Revenue Acts of 1921, 1924, and 1926, respectively (*infra*, pp. 34, 35), provides in part as follows:

> * * * Where, however, the executor sells property of the estate for more than its *value*

> *at the death of the decedent*, the excess is income, or may be capital gain, taxable to the estate. * * * (Italics ours.)

Article 863 of Regulations 74, promulgated under the Revenue Act of 1928, is substantially identical with Article 343 of Regulations 62, 65, and 69, *supra*.

It follows, therefore, that the interpretation given to the Revenue Acts by the regulations of the Treasury Department are in harmony with the statute and are calculated to carry out the Congressional purpose, and hence have the force and effect of law.

B. *The legislative history of the Revenue Acts confirms the departmental construction placed upon them*

The House Committee, in considering the Revenue Act of 1921 (Committee on Ways and Means of the 67th Congress, First Session, Report No. 350) had before it and considered the decision in *Merchants' Loan & Trust Co.* v. *Smietanka*, 255 U. S. 509 (decided March 28, 1921), in which this Court held that a trustee receiving property under a will was taxable precisely the same as a beneficiary would be taxable had he received the property direct from the decedent. The report of the Committee states as follows:

> In the case of property acquired before March 1, 1913, under existing law, the basis for determining gain or loss is the fair market price or value of such property as of that date. The decision of the Supreme Court in the case of *Merchants' Loan & Trust Co.* v. *Smietanka*

(decided Mar. 28, 1921), makes necessary not a fundamental modification of that rule, but a more detailed statement of its application.

The proposed bill gives explicit effect to the doctrine approved in that decision. * * *

The special rules embodied in existing law with respect to property which should be included in the inventory, and property acquired by bequest, devise, or inheritance are in substance preserved. An essential change, however, is made in the treatment of property acquired by gift. * * * The proposed bill, in paragraph (2) of subdivision (a) provides a new and just rule, namely, that in the case of property acquired by gift after December 31, 1920, the basis for computing gain or loss shall be the same as the property would have in the hands of the donor or the last preceding owner by whom it was not acquired by gift.

Inasmuch as the report gave explicit approval to the decision in the *Smietanka* case, and made a change in the law as to gifts, it seems to have given approval to the regulations and practice of the Department which used as the basis for determining gain or loss upon a sale by trustees, executors, or administrators the value at date of death (if subsequent to March 1, 1913).

As already stated, the provisions involved herein were reenacted in the Acts of 1924 and 1926 without substantial change and hence in affirmance of the departmental regulations then in force.

The discussions and reports which preceded the adoption of the Revenue Act of 1928 throw light upon the intent of Congress as expressed in the earlier Revenue Acts. (So much of the Senate and House Reports as relates to this particular matter is set forth in full *infra*, pp. 31–38.) The House Report states in part as follows:

> In view of the decision of the Court of Claims in *McKinney* v. *United States*, it is desirable specifically to provide what basis shall be used in determining gain or loss on the sale of property by an estate. It is believed that the basis should be the value of the property on the date of the decedent's death, and this rule is incorporated in section 113 (a) (5).

The Senate Report states in part as follows:

> The decision by the Court of Claims in *McKinney* v. *United States* has caused confusion in the existing law as to the basis on which an executor must determine gain or loss on the sale by him of property of the estate. The House bill in section 113 (a) (5) provides that in such cases the basis shall be the fair market value of the property at the time of the death of the decedent. * * *

See also Report of the Joint Committee on Internal Revenue Taxation, *infra*, pp. 37–38.

We submit that these reports show clearly that Congress intended by the earlier Acts, as well as the Act of 1928, to make the basis the value of the

property on the date of decedent's death, and that it was only "in view of the decision of the Court of Claims in *McKinney* v. *United States*", holding a contrary rule, that Congress found it necessary to provide "specifically", in the 1928 Act, what it had intended by the prior Acts. In other words, the reports show clearly that Congress regarded the *McKinney* decision as contrary to the statute and the Congressional intent; and, to correct the misapprehension of the Court of Claims, specific provisions were inserted in the 1928 Act.

Further indication of the intent of Congress in the earlier Acts is contained in the history of Section 702 of the Revenue Act of 1928 (*infra*, pp. 37–38). (The general effect of that section is discussed hereinabove.) It is here to be noted that this section, as it was reported to the Senate, covered only those instances in which returns were filed in accordance with the regulations. (See H. R. 1, 70th Congress, 1st Session.) The Senate, however, added provisions covering the instances where computations (of gain or loss) were made on the basis of value at the date of death, without regard to whether or not such computations complied with the regulations then in force. Such was the form in which the bill was finally enacted. This shows that Congress was more concerned with the use of the proper basis (value at date of death of the decedent) than with a strict conformance with the regulations then in force.

II

AUTHORITIES DEALING WITH THE POINT AT ISSUE[8]

A. Decisions of the Board of Tax Appeals

The Board of Tax Appeals has consistently held that the basis for determining the gain or loss on the sale of property by the estate of a decedent is the value of such property at the date of death of the decedent.

Bray v. *Commissioner*, 4 B. T. A. 42 (1926).
Straight v. *Commissioner*, 7 B. T. A. 177 (1927).
Barnes v. *Commissioner*, 8 B. T. A. 360 (1927).
Blodget v. *Commissioner*, 13 B. T. A. 1243 (1928).
Wolfe v. *Commissioner*, 15 B. T. A. 835 (1929).
Central Trust Co. v. *Commissioner*, 19 B. T. A. 867 (1930).
Pierce v. *Commissioner*, 22 B. T. A. 1070 (1931).
Ayer v. *Commissioner*, 26 B. T. A. 9 (1932).

B. Decisions of District and Circuit Courts

In *Bankers' Trust Co.* v. *Bowers*, 23 F. (2d) 941, the District Court for the Southern District of New York, in a well-reasoned opinion, has taken the same view and, construing the provisions of the Revenue Act of 1926, held that the basis for determining the gain or loss on the sale of property by the executor of a decedent's estate is the value of the property at the date of decedent's death.

[8] For able and comprehensive discussion of the question herein, attention is directed particularly to the opinions (in addition to the opinion of the Circuit Court of Appeals herein) in *Straight* v. *Commissioner*, 7 B. T. A. 177; *Bankers Trust Co.* v. *Bowers*, 23 F. (2d) 941 (S. D. N. Y.), and the dissenting opinion of Littleton, J., in *Myers* v. *United States*, 72 C. Cls. 214.

The Circuit Court of Appeals for the Sixth Circuit has held likewise, in *Eldredge* v. *United States*, 31 F. (2d) 924, 930.

C. Decision of this Court

Brewster v. *Gage*, 280 U. S. 327.

In that case the precise question related to the basis for determining gain or loss from sales by a residuary legatee. This Court found it important to consider the similar situation of sales by an executor, and hence to interpret the section of the statute which is here in issue. Accordingly, this Court ruled that the basis in the case of sales by an executor is the value at date of decedent's death, and further ruled that the same basis should be taken in the case of sales by a legatee. Furthermore, this Court took cognizance of the regulations which had been promulgated by the Treasury Department for a period of many years.

The following language used by this Court (pp. 335, 336) is of especial significance herein:

> The Revenue Act of 1918 and subsequent Acts taxed incomes of estates during the period of the administration including profits on sales of property, and *such gains are calculated on value at date of decedent's death.* There appears to be no reason why gains or losses to the estate should be calculated on one basis and those to the residuary legatees on another. (Italics ours.)

The court below has very properly regarded this Court's decision in the *Brewster* case as highly significant herein. Referring to the above quoted language of this Court, Mr. Justice Stone (in the Circuit Court of Appeals) stated: "This language was not lightly used and it may not be lightly put aside. Though not spoken as to the matter now before us, we would hesitate to regard it other than as on the very edge of controlling authority" (R. 116).

It is also significant that the *McKinney* case, on which petitioner herein bases his contentions, was fully discussed in the brief before this Court in the *Brewster* case, and the fact brought out that it was *contra* the departmental regulations and practice.

The Court of Claims itself has cited and followed *Brewster* v. *Gage* in its recent decision in *McCann* v. *United States*, 48 F. (2d) 446 (discussed hereinafter).

D. Decisions of the Court of Claims

The Court of Claims alone has taken the contrary view in—

McKinney v. *United States*, *supra*.

Elmhirst v. *United States*, 69 C. Cls. 295, certiorari denied, 282 U. S. 851.

Myers v. *United States*, 72 C. Cls. 214.

The last two cases were decided on the authority of the first.[9]

[9] In the *Myers* case, *supra*, two out of the five judges sitting concurred in the result *solely* on the ground that the same question had been decided by the court in two earlier cases, one of the two stating in a carefully reasoned opinion his personal disagreement with the views of the majority.

The decisions in the *McKinney* and *Elmhirst* cases were based upon the Revenue Act of 1918. It should be noted that the 1918 Act did not contain any provision corresponding to subsection 202 (a) (3) of the 1921 Act, and 204 (a) (5) of the Revenue Acts of 1924 and 1926 (*infra*, pp. 30, 32). These provisions in the 1921 and subsequent Acts are highly significant herein, in interpreting other provisions of the same section.

The view taken by the Court of Claims is, we submit, unsound, and cannot be supported, for the following reasons: (a) the court places undue emphasis upon the word "cost" used in the statute (or what petitioner herein calls the "doctrine of actual gains,"—brief, p. 14); (b) misinterprets the representative capacity in which an executor acts (see petitioner's brief, pp. 18, 20); and (c) fails to give proper effect to related provisions of the statute; furthermore, the decisions of that court are not consistent.

As to "cost": The petitioner herein, following the line of the decision of the Court of Claims in the *McKinney* case, asks this Court to disregard other provisions of the statute, and to determine the case solely upon a narrow construction of the word "cost." Petitioner contends, in effect, that "cost" means financial outlay, or purchase price, and that, since there is no such "cost" to the executor, it must necessarily follow that the "cost" to the decedent was intended in all cases. That, we submit, is an erro-

neous construction of the statute, based upon a too narrow meaning given to the word "cost."[10]

This Court has held that the provision of the statute making "cost" (or March 1, 1913, value) the basis does not exclude the use of market value, when there was literally no cost to the taxpayer at the date as of which basis is taken. In *Heiner* v. *Tindle*, 276

[10] In this connection, the language of this Court (construing a different section of the statute) in the recent case of *Helvering* v. *Stockholms Enskilda Bank*, 293 U. S. 84, 87, 89, is applicable:

"* * * since most words admit of different shades of meaning, susceptible of being expanded or abridged to conform to the sense in which they are used, the presumption readily yields to the controlling force of the circumstance that the words, though in the same act, are found in such dissimilar connections as to warrant the conclusion that they were employed in the different parts of the act with different intent. * * * The intent of Congress, therefore, in the one case, is fulfilled by giving the phrase a construction within the narrow purposes of § 213 (b) (4); and, in the other case, by a construction, if the phrase fairly admits of it, which will effect the obviously different statutory aim of § 217 (a).

* * * * * *

"* * * If, upon a consideration of the context and the objects sought to be attained and of the act as a whole, it adequately appears that the general words were not used in the restricted sense suggested by the rule, we must give effect to the conclusion afforded by the wider view in order that the will of the legislature shall not fail."

In *Brewster* v. *Gage*, *supra*, the petitioner sought to give to the word "acquisition" a strict and narrow construction (namely, physical possession). This Court, however, refused to accept the narrow interpretation, and gave the word a broader meaning which carried out the legislative intent, holding that "acquisition" by a residuary legatee dated from testator's death, and not from the time of distribution.

U. S. 582, 585–586, this Court did not take as basis the "cost" to the taxpayer, but rather the market value at the time the property (house) was converted into income-producing property [11].

When Congress intended that cost to someone other than the taxpayer should be the basis, as in the case of property acquired by gift, it expressly so provided. See Section 202 (a) (2) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 229. There was no such provision in the earlier Acts.

Moreover, as was pointed out in the opinion in *Bankers' Trust Co.* v. *Bowers*, 23 F. (2d) 941 (S. D. N. Y.), the rule that market value at the time of acquisition (and not "cost") shall be the basis in the case of property acquired by bequest, devise, or inheritance, furnishes a guide to the intent of Congress in respect of the present question, for there is no logical reason for distinguishing between property in the hands of an executor and property in the hands of a legatee or heir. See also *Brewster* v. *Gage*, *supra*.

[11] *Heiner* v. *Tindle* involved the deductibility of a loss sustained upon the sale of property originally purchased and used for a long time as a residence, and later used as property for the production of income and profit. The Court, in holding that the *fair market value of property at the date of the change from residence to business property* (although the statute was silent in that regard) was the proper basis for determining gain or loss upon a subsequent sale, said:

"* * * The same and no greater inconsistency and difficulty arise in the case of property acquired by gift, bequest, or devise, when market value at the time of acquisition by the donee and not cost is necessarily the basis of computing the tax."

As to the representative capacity of the executor: Although an executor represents the decedent for the purpose of administering and disposing of his property, the provisions of the income tax law, making the estate a separate and distinct taxpayer, make the executor independent of the decedent, and the representative of the beneficiaries. Hence, for tax purposes, the executor does not act as a representative of the decedent, but for the beneficiaries who will eventually receive the income and corpus of the estate. As this Court said in *Brewster* v. *Gage, supra* (p. 334):

> * * * Upon acceptance of the trust there vests in the administrators or executors, as of the date of the death, title to all personal property belonging to the estate; it is taken, not for themselves, but in the right of others for the proper administration of the estate and for distribution of the residue. The decree of distribution confers no new right; it merely identifies the property remaining, evidences right of possession in the heirs or legatees and requires the administrators or executors to deliver it to them. The legal title so given relates back to the date of the death. *Foster* v. *Fifield*, 20 Pick. 67, 70. *Wager* v. *Wager*, 89 N. Y. 161, 166. *Thompson* v. *Thomas*, 30 Miss. 152, 158.

As to other related provisions of the statute, which the Court of Claims in effect disregards: It is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words are used, but will take into consideration (in

interpreting the words) other provisions of the statute indicating the general object and policy of the law. As this Court recently stated in *Helvering* v. *New York Trust Co.*, 292 U. S. 455, at 464, "the expounding of a statutory provision strictly according to the letter without regard to other parts of the Act and legislative history would often defeat the object intended to be accomplished." Numerous expressions to the same effect are contained in the cases.

Section 202 (a) (3) of the 1921 Act and Section 204 (a) (5) of the Acts of 1924 and 1926 provide that "If the property was acquired by bequest, devise, or inheritance, the basis shall be the fair market value of such property at the time of such acquisition." (This Court has held that the "time of acquisition" is the date of decedent's death, *Brewster* v. *Gage*, *supra*.) Although this provision does not specifically prescribe the basis as to property sold by an executor, we submit that the provision does have a direct relation thereto. Although property left by a decedent, which becomes part of his estate, is strictly not acquired by his estate by bequest, devise, or inheritance, nevertheless, in so far as any beneficial interest is concerned, such property is acquired by the beneficiaries by bequest, devise, or inheritance; and it is not an unreasonable interpretation to hold that the language of these sections is broad enough to cover property thus acquired, although the estate is still in the course of administration. As was said in *Bankers' Trust Co.* v. *Bowers*, 23 F. (2d) 941, 943:

> * * * For tax purposes the distinction between the estate and the decedent is real,

> but that between the estate and its beneficial owners is artificial, and, if necessary to effectuate the intent of the statute, there should be no hesitancy in holding property held by executors within the meaning of the words "acquired by bequest, devise, or inheritance," as used in section 204 (a) (5).

Petitioner's brief herein makes not even a casual reference to these pertinent provisions of the statute.

The decisions of the Court of Claims are not consistent: In *Nichols* v. *United States*, *supra*, the Court of Claims rendered a decision which we believe is contrary to its decision in the *McKinney*, *Elmhirst*, and *Myers* cases. In the *Nichols* case the question was whether the decedent's distributive share of commissions earned prior to his death by a partnership of which he was a member and paid over to his executors after his death, constituted income of his estate subject to income tax. It was held that the decedent's share of these commissions was not taxable as income to his estate, but constituted a part of the corpus.[12] The following language in the court's opinion is to be noted (p. 245):

> * * * For taxation purposes the individual's income during his lifetime and the income of his estate after his death are distinct things, *the individual and his estate being separate entities.* * * * The income of an estate which the statute taxes is, generally

[12] In the later case of *Elmhirst* v. *United States*, 38 F. (2d) 915, 922, the Court of Claims purports to distinguish the *Nichols* case (calling it "simply a question of double taxation") and follows the *McKinney* case.

> speaking, the income which accrues after the estate begins, and it begins with the decedent's death. * * *

In the case of *McCann* v. *United States*, 48 F. (2d) 446, 448, the Court of Claims ruled that the value at date of testator's death is the basis for ascertainment of gain or loss on a sale of real estate by an executor to a devisee (under Section 213 (b) (3) of Revenue Act of 1918). In making that ruling the Court of Claims cited the decision of this Court in *Brewster* v. *Gage*, *supra*, and stated as follows:

> Immediately upon the death of the owner, title to his real estate passes to his heirs or devisees. The value at the time of Cole's death is the basis for the ascertainment of gain or loss on the sale of real estate. That is the time of acquisition. Under the will of Cole, his executor had the power of sale of the real estate for distribution, but the title of Cooke vested at the time of death of Cole and its value as of that time is the basis on which the tax should be computed. *Brewster* v. *Gage*, 280 U. S. 327, 50 S. Ct. 115, 74 L. Ed. 457.

The plaintiffs, however, contended that the *McKinney* and *Elmhirst* cases sustained their position, but the Court of Claims distinguished those cases. We submit that there is no basic distinction, for immediately upon the testator's death certain rights of legatees as well as devisees are vested. *Brewster* v. *Gage*, *supra*.

We submit that the view taken by the Court of Claims in the *McKinney*, *Elmhirst*, and *Myers* cases, *supra*, is unsound, and inconsistent with its decisions in the *Nichols* and *McCann* cases.[13]

III

INJUSTICE RESULTS FROM THE RULE FOR WHICH PETITIONER CONTENDS

A further reason for construing the statutes as fixing the basis as the value at death of decedent is that the basis must be either that or acquisition value to decedent, and that the latter would lead to injustice. The injustice arises from the situation that the estate tax is imposed upon the value of property at decedent's death, which takes into consideration the increase or decrease since purchase; and to construe the statutes as designating the cost to decedent as the basis for income taxation may result either in double taxation (on the appreciation in value of the property in the hands of the decedent)[14], or an escape from

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[13] As to the inconsistency between the *Nichols* case and other decisions of the Court of Claims, see *Bankers' Trust Co.* v. *Bowers*, 23 F. (2d) 941, 944, in which the District Judge stated as follows:

"I am unable to reconcile that [*McKinney*] decision with what was said in the same court recently in the case of *Nichols* v. *United States* * * * I am impressed with the soundness of the views expressed by the court in the *Nichols* case, and am constrained to conclude, contrary to the decision in the *McKinney* case, that the value of the property at the date of death, not the cost thereof during decedent's life, was the proper basis for computing the tax here involved."

[14] Petitioner in the case at bar goes so far as to say (brief, bot. p. 12) that "such a burden, even though the tax may be heavy, is not unfair or unjust * * *."

taxation (on the appreciation in value since decedent's death). The basis of value at date of decedent's death avoids both these results and, therefore, should be adopted.[15] See *Burnet* v. *Guggenheim*, 288 U. S. 280, 285; *Knowlton* v. *Moore*, 178 U. S. 41, 77; *United States* v. *Supplee-Biddle Co.*, 265 U. S. 189; *Bankers' Trust Co.* v. *Bowers*, *supra*.

The rule advocated by the Commissioner and applied by him in the case at bar (taking as basis the value at date of decedent's death) cannot be said, as a general matter, to work either for or against the taxpayer. In some instances it increases the tax, but in most cases the tax will be less. As this Court stated in *Brewster* v. *Gage*, 280 U. S. at 335, speaking of the general application of the rule:

> * * * The rule that ambiguities in tax laws are to be resolved in favor of taxpayers has no application here because it is impossible to determine which basis would impose a greater burden. * * *

In *Straight* v. *Commissioner*, 7 B. T. A. at 183, it was stated as follows:

> In this case the value is less than the cost, with the result that gain is greater than it would have been if cost had been used as the

[15] The Report of the Joint Committee on Internal Revenue Taxation (House Document 139) states in part as follows: "The rule of the McKinney case is inconvenient, for it is often impossible to determine the decedent's cost or other basis. Moreover, as a practical matter, it results in taxing the value of bequests, devises, and inheritances as income."

> basis. In the ordinary case the value is greater than cost and the gain is less than it would have been if cost had been used as basis. * * *

It is apparent, therefore, that in the ordinary case, as distinguished from the case at bar, the rule applied by the Commissioner operates to make the tax less than it would be if the cost to the decedent was taken as the basis. The rule was adopted and has consistently been applied because it conforms to the statute and is the only rule which operates fairly to all concerned.

IV

DEPLETION AND DEPRECIATION

Under the statutes the basis for computing depreciation and depletion on property is the same as the basis for determining the gain or loss on the sale of property. Section 204 (c), Revenue Acts of 1924 and 1926, *infra*, pp. 31, 32. Since the correct basis for determining gain or loss on the sale of property of a decedent's estate is the value thereof at the date of the decedent's death, it follows that such is the proper basis for computing depreciation and depletion.

CONCLUSION

In view of the foregoing, the decision below should be affirmed.

Respectfully submitted.

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MARCH 1935.

APPENDIX

REVENUE ACTS

Revenue Act of 1921, c. 136, 42 Stat. 227, 229:

SEC. 202. (a) That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal, or mixed, acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * *

(3) In the case of such property, acquired by bequest, devise, or inheritance, the basis shall be the fair market price or value of such property at the time of such acquisition. The provisions of this paragraph shall apply to the acquisition of such property interests as are specified in subdivision (*c*) or (*e*) of section 402.

Revenue Act of 1924, c. 234, 43 Stat. 253:

SEC. 204. (a) The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * *

(5) If the property was acquired by bequest, devise, or inheritance, the basis shall be the fair market value of such property at the time of such acquisition. The provisions of this paragraph shall apply to the acquisition of such property interests as are specified in subdivision (c) or (e) of section 402 of the Revenue Act of 1921, or in subdivision (c), (d), or (f) of section 302 of this Act;

* * * * *

* * * * *

(b) The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, shall be (A) the cost of such property (or, in the case of such property as is described in paragraph (1), (4), or (5), of subdivision (a), the basis as therein provided), or (B) the fair market value of such property as of March 1, 1913, whichever is greater. In determining the fair market value of stock in a corporation as of March 1, 1913, due regard shall be given to the fair market value of the assets of the corporation as of that date.

(c) The basis upon which depletion, exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the same as is provided in subdivision (a) or (b) for the purpose of determining the gain or loss upon the sale or other disposition of such property, * * *

(U. S. C., Title 26, Sec. 935.)

SEC. 212. (a) In the case of an individual the term "net income" means the gross income as defined in section 213, less the deductions allowed by sections 214 and 206.

(b) The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. * * *

(U. S. C., Title 26, Sec. 953.)

SEC. 219. (a) The tax imposed by Parts I and II of this title shall apply to the income

of estates or of any kind of property held in trust, including—

* * * * *

(3) Income received by estates of deceased persons during the period of administration or settlement of the estate; * * *

* * * * *

(b) Except as otherwise provided in subdivisions (g) and (h), the tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that—

* * * * *

(U. S. C., Title 26, Sec. 960.)

Revenue Act of 1926:

Sections 204 (a), (5), (b), and (c), and 212 (a), (b), and 219 (a) (3) and (b), of the Revenue Act of 1926, c. 27, 44 Stat. 9 (U. S. C. App., Title 26, Secs. 935, 953, and 960), so far as material, are identical with the corresponding provisions of the Revenue Act of 1924, set forth above.

Revenue Act of 1928, c. 852, 45 Stat. 791, 818, 879:

SEC. 113. BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Property acquired after February 28, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * *

(5) *Property transmitted at death.*—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the

property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death;

* * * * *

SEC. 702. BASIS OF PROPERTY UPON SALE BY ESTATE—RETROACTIVE.

(a) If in the return of any decedent's estate for any taxable year preceding the taxable year 1928, the basis, upon which gain or loss realized upon the sale or other disposition of property acquired by the estate from the decedent was computed, was the value of the property at the time of the death of the decedent or was in accordance with the regulations in force at the time such return was filed, then the computation of such gain or loss shall be made upon such basis, unless claim for refund or credit in respect of such basis, or a written election not to come within the provisions of this subsection, has been filed by the estate before the expiration of the period of limitation for filing claims.

(b) In every other case the computation of the gain or loss realized by an estate in any taxable year preceding the taxable year 1928 from the sale or other disposition by it of property acquired by the estate from the decedent, shall be made on such basis as is in accordance with the law properly applicable thereto, without regard to any provision of this Act.

TREASURY REGULATIONS

Treasury Regulations 45, promulgated under the Revenue Act of 1918:

ART. 343. *Decedent's estate during administration.*—The "period of administration or settlement of the estate" is the period required by the executor or administrator to perform the ordinary duties pertaining to administration, in particular the collection of assets and the payment of debts and legacies. It is the time actually required for this purpose, whether longer or shorter than the period specified in the local statute for the settlement of estates. Where an executor, who is also named as trustee, fails to obtain his discharge as executor, the period of administration continues up to the time when the duties of administration are complete and he actually assumes his duties as trustee, whether pursuant to an order of the court or not. No taxable income is realized from the passage of property to the executor or administrator on the death of the decedent, even though it may have appreciated in value since the decedent acquired it. In the event of delivery of property in kind to a legatee or distributee, no income is realized. *Where, however, the executor sells property of the estate for more than its value at the death of the decedent, the excess is income taxable to the estate.* See article 1562. (Italics ours.)

Article 343 of Treasury Regulations 62 (under Act of 1921), 65 (under Act of 1924), and 69 (under Act of 1926), so far as material, are substantially identical with Article 343 of Regulations 45, set forth above.

Treasury Regulations 74, promulgated under the Revenue Act of 1928:

> ART. 596. *Property transmitted at death.*—In the following cases the basis for determining gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the fair market value of the property at the time of the death of the decedent:
>
> * * * * *
>
> (3) Property, whether real or personal, in the hands of a decedent's estate, acquired by the estate from the decedent (see article 863).
>
> * * * * *

Article 863 of Regulations 74 is substantially identical with Article 343 of Regulations 45, 62, 65, and 69, *supra*.

LEGISLATIVE HISTORY OF REVENUE ACT OF 1928

The Committee on Ways and Means, in House Report No. 2, 70th Congress, 1st Session, page 18, deals with Section 113 (a) (5) of the Revenue Bill of 1928, as follows:

> In view of the decision of the Court of Claims in *McKinney* v. *United States*, it is desirable specifically to provide what basis shall be used in determining gain or loss on the sale of property by an estate. It is believed that the basis should be the value of the property on the date of the decedent's death, and this rule is incorporated in section 113 (a) (5).
>
> It is also provided, in the same paragraph, that the basis in case of a sale by a beneficiary shall be the value of the property on the date of the decedent's death.

> Under existing law, the basis in such a case is the value at the date of "acquisition", which is indefinite and has given rise to controversy. The value on the date of death affords an equitable and more readily determinable basis.

The Senate Committee on Finance stated with respect to the proposed change (Senate Report No. 960, 70th Cong., 1st Sess., p. 26):

> The decision by the Court of Claims in *McKinney* v. *United States* has caused confusion in the existing law as to the basis on which an executor must determine gain or loss on the sale by him of property of the estate. The House bill in section 113 (a) (5) provides that in such cases the basis shall be the fair market value of the property at the time of the death of the decedent. In the same section the House bill provides the same basis shall be used where the property is sold by the beneficiary.
>
> It appears that the House bill is inadequate to take care of a number of situations which frequently arise. For example, the executor, pursuant to the terms of the will, may purchase property and distribute it to the beneficiaries, in which case it is impossible to use the value at the decedent's death as the basis for determining subsequent gain or loss, for the decedent never owned the property. Moreover, the fair market value of the property at the decedent's death cannot properly be used as the basis, in the case of property transferred in contemplation of death where the donee sells the property while the donor is living.
>
> Accordingly, the committee has revised section 113 (a) (5) and certain related sections, so as to provide that in the case of a specific bequest of personalty or a general or specific devise of realty, or the transmission of realty by intestacy, the basis shall be the

fair market value at the time of the death of the decedent. In these cases it may be said, as a matter of substance, that the property for all practical purposes vests in the beneficiary immediately upon the decedent's death, and therefore the value at the date of death is a proper basis for the determination of gain or loss to the beneficiary. The same rule is applied to real and personal property transmitted by the decedent, where the sale is made by the executor. In all other cases the basis is the fair market value of the property at the time of the distribution to the taxpayer. The latter rule would obtain, for example, in the case of personal property not transmitted to the beneficiary by specific bequest, but by general bequest or by intestacy. It would also apply in cases where the executor purchases property and distributes it to the beneficiary.

Report of Joint Committee on Internal Revenue Taxation, House Document 139, 70th Congress, First Session (pp. 17–18):

Basis for Gain or Loss on Sales by an Executor

Until recently gain or loss on an executor's sale was measured by the value at the decedent's death of what was sold. As a result of the decision by the Court of Claims in *McKinney* v. *United States*, and the denial of certiorari by the United States Supreme Court, the rule was changed so as to provide that gain or loss on such a sale would be measured as though the decedent had sold the property during his life.

The rule of the McKinney case is inconvenient, for it is often impossible to determine the decedent's cost or other basis. Moreover,

as a practical matter, it results in taxing the value of bequests, devises, and inheritances as income. The old rule seems preferable, and it is recommended that it be set forth in the statute.

Section 204 (a) (5) prescribes the basis when the beneficiary sells the property as the value at the time of "acquisition." Some doubt has arisen as to what is meant by the date of acquisition. The "date of death" is recommended to make the basis certain and definite.

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SUPREME COURT OF THE UNITED STATES.

No. 602.—October Term, 1934.

Cavour Hartley, Executor of the Estate of G. G. Hartley, Petitioner, *vs.* Commissioner of Internal Revenue.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[April 29, 1935.]

Mr. Justice Stone delivered the opinion of the Court.

The Court of Appeals for the Eighth Circuit, 72 F. (2d) 352, affirmed a ruling of the Board of Tax Appeals, 27 B. T. A. 952, and held that under § 202 of the Revenue Act of 1921, c. 136, 42 Stat. 227, 229, and § 204 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 258, the basis for computing gain or loss on the sale of property, and its depletion or depreciation, for purposes of taxing income returned by the petitioner, an executor, is its value at the date of the decedent's death, rather than the cost to the decedent, or the value on March 1, 1913, if acquired before that date.

We granted certiorari, — U. S. —, to resolve a conflict of the decision below, and of the like decision, under § 202 of the 1918 Revenue Act, c. 18, 40 Stat. 1057, 1060, of the Court of Appeals for the Sixth Circuit in *Eldredge* v. *United States*, 31 F. (2d) 924, 930, with that of the Court of Claims in *McKinney* v. *United States*, 62 C. Cls. 180. See *Elmhirst* v. *United States*, 38 F. (2d) 915; *Myers* v. *United States*, 51 F. (2d) 145; compare *McCann* v. *United States*, 48 F. (2d) 446, each decided by the Court of Claims.

Petitioner's tax returns[1] were for the calendar years 1924 and 1925. Sections 202 (a), (b) and 214 (a) (8), (10) of the 1921 Act, and § 204 (a), (b), (c) of the Revenue Acts of 1924 and 1926, c. 77, 44 Stat. 9, provide that the basis for computing gain or loss on the sale of property, and depreciation and depletion, shall be its cost, or its value on March 1, 1913, if acquired before that date. None of the acts specifically provides a basis for making the compu-

[1] As permitted by § 702 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 879, petitioner elected to have his tax determined "in accordance with the law properly applicable," § 702 (b), rather than "in accordance with the regulations in force at the time such return was filed," § 702 (a).

tations where return is made of income received by the estate of a decedent in the course of administration. But in the case of property acquired by "bequest, devise, or inheritance" § 202 (a) (3) of the 1921 Act and § 204 (a) (5) of the 1924 and 1926 Acts provide that the basis shall be the fair market value "at the time of acquisition."

The revenue acts consistently treat the estate of a decedent in the hands of an administrator or executor as a separate taxpayer. By § 2 of the 1921, 1924 and 1926 Acts the estate of a decedent is embraced within the term "taxpayer." Each Act specifically provides for taxation of the income of an estate during administration. § 219 of the 1921, 1924 and 1926 Acts. Each includes profits from the sale of property by the taxpayer in taxable income, § 213 of the 1921, 1924 and 1926 Acts, and provides for the deduction of losses from gross income in arriving at taxable income, § 214 of the 1921, 1924 and 1926 Acts. See *Merchants Loan & Trust Company* v. *Smietanka*, 255 U. S. 509, 516, 517. Each makes provision for the imposition of a tax upon the estates of deceased persons, and the "gross estate" which is the basis for computing the tax is the value of the decedent's property at the time of his death. § 402, 1921 Act; § 302, 1924 and 1926 Acts.

The Court of Claims held that the time of acquisition, indicated by § 202 (a) of the 1921 Act and § 204 (a) of the 1924 and 1926 Acts as the controlling date for calculating gain or loss to the estate in the course of administration, must be taken to be the date of acquisition by the decedent rather than the time of acquisition by the executor or administrator on the decedent's death. This conclusion, it was thought, was compelled by the statutory command that the basis of computation shall be "cost," which could have no application to the acquisition by the executor or administrator, who is not a purchaser of the estate which he administers. *McKinney* v. *United States, supra*, 188. But this specification is not enough to restrict the effect of the general provisions of these revenue acts which impose a tax on the income, including capital gains, of taxpayers. The use of the word cost does not preclude the computation and assessment of the taxable gains on the basis of the value of property, rather than its cost, where there is no purchase by the taxpayer, and thus no cost at the controlling date. See *Heiner* v. *Tindle*, 276 U. S. 582, 585, 586; *Lucas* v. *Alexander*, 279 U. S. 573, 578, 579.

No plausible reason has been advanced for supposing that Congress intended the capital gains or losses of the estate of a decedent to be treated any differently from those resulting from the sale of property taken by "bequest, devise, or inheritance," as provided in § 202 (a) (3) of the 1921 Act and § 204 (a) (5) of the 1924 and 1926 Acts, or that it intended to bring gains or losses, accruing between the date of decedent's acquisition of the property and his death, into the computation of both the estate tax and the income tax assessed upon his administrator or executor. When it had a different purpose in the case of gifts inter vivos, not subject to a gift tax, it specifically directed that gains or losses to the donee should be computed on the basis of the cost of the property at the date of acquisition by the donor. § 202 (a) (2), 1921 Act; § 204 (a) (2)-(4), 1924 and 1926 Acts; see *Taft* v. *Bowers*, 278 U. S. 470; *Helvering* v. *New York Trust Co.*, 292 U. S. 455, 462. The conclusion seems inescapable that the intended date of acquisition by an executor or administrator, where the estate is the taxpayer, is the date of the decedent's death. *Brewster* v. *Gage*, 280 U. S. 327, 335.

Possibility of doubt was removed by treasury regulation. Article 343 of Regulation 45, under the 1918 Act, prescribed that gains or losses of an estate should be computed on the basis of the value of the property at the date of the decedent's death. This was carried forward by Art. 343 of Reg. 62 under the Act of 1921, of Reg. 62 under the Act of 1924, and of Reg. 69 under the Act of 1926. Following the decision of the Court of Claims in *McKinney* v. *United States, supra,* and with the purpose of conforming to it, the ruling was amended by T. D. 4011, VI-1 Cum. Bul. 77, on April 6, 1927, so as to make the cost to the decedent the basis of the computation. Doubts having been raised as to the ruling in *McKinney* v. *United States, supra,* by later decisions,[2] the amendment was revoked and Article 343 restored to its original form, T. D. 4177, VII-2 Cum. Bul. 134, on July 7, 1928. The substance of the regulation in its original and final form was carried into § 113 (a) (5) of the Revenue Act of 1928, c. 852, 45 Stat. 791, 819, which directed that the basis for the computation of gains or losses upon property acquired by the decedent's estate from the decedent should be its value at the time of the decendent's death.

[2]Nichols v. United States, 64 C. Cls. 241; Bankers' Trust Co. v. Bowers, 23 F. (2d) 941 (S. D., N. Y.); Straight v. Commissioner, 7 B. T. A. 177.

The reenactment of the pertinent provisions of § 202 of the Revenue Act of 1921 in the Acts of 1924 and 1926, without material change, was a congressional recognition and approval of the interpretation of the section by the treasury regulations, which gave them the force of law: *Old Mission Portland Cement Co.* v. *Helvering*, 293 U. S. 289, 293, 294; *Brewster* v. *Gage*, *supra*, 337. The incorporation of the regulation in § 113 (a) (5) of the 1928 Act was intended to clarify, but not to change the law. See Report of House Committee on Ways and Means, No. 2, 70th Cong., 1st Sess., p. 18; Report of Senate Committee on Finance, No. 960, 70th Cong., 1st Sess., p. 26; Report of Joint Committee on Internal Revenue Taxation, H. R. Doc. 139, 70th Cong., 1st Sess., pp. 17, 18.

Affirmed.